



Federal Aviation Administration

Finding and Waiver 49 U.S.C. §50101

Public Interest – Contracts requiring application of both the BAA (for purposes of the Bipartisan Infrastructure Law (BIL)) and the FAA Buy American Preference (BAP)

In accordance with 49 U.S.C. §50101, in a memorandum titled “Delegation for FAA Buy American” and dated April 3, 2012, the Federal Aviation Administration (FAA) Administrator delegated to the FAA Acquisition Executive (FAE) authority to make findings waiving the provisions of the FAA BAP. Accordingly, and for the reasons outlined below, this memorandum serves as a justification in the public’s interest to temporarily waive application of BAP in favor of the Buy American Act (BAA) (41 U.S.C. §§8301-8305) for BIL¹ funded contracts where there is dual application of Buy American laws.

BIL makes a once-in-a-generation investment in America’s transportation infrastructure. This includes infusing the FAA’s Facilities and Equipment (F&E) account with funding from the general fund. Specifically, Congress appropriated \$5 billion dollars in BIL-funding to make critical improvements to air traffic facilities and equipment across the country.² As a part of the investment, BIL includes the Build America, Buy America Act, which expands upon existing BAA law and applies BAA to BIL-funded infrastructure projects. Thus, BIL-funded acquisitions to replace or improve facilities and equipment over the micro-purchase threshold will be governed by the BAA.

This is a marked change from the FAA’s former process for acquiring F&E funded contracts, which, up to now, have been primarily funded by the Airport & Airway Trust Fund (AATF). Under 49 U.S.C. §50101 (BAP), Congress specifically called-out the Airport & Airway Trust Fund, mandating that the Administrator may not “obligate an amount that may be appropriated to carry out chapter 481 [the AATF]... unless the steel and manufactured products used in the project are produced in the United States.” In other words, because a vast majority of the FAA’s funding was from the AATF, BAP applied. Now, there is a higher likelihood that BAA will

¹ Formally, the Infrastructure Investment and Jobs Act (IIJA), 2021, Pub. L. No. 117-58.

² Note: BIL additionally appropriates funds to the FAA to make improvements to airport infrastructure and airport terminals under its existing grant program, the Airport Improvement Program. Such acquisitions are not subject to the AMS nor are they applicable to this finding and waiver.

apply to FAA acquisitions, and, in some instances, if both types of funding are used, situations where both laws would apply.

This is problematic. The BAA and BAP have varied and overlapping authority, and, although this has been the case since BAP was enacted, the introduction of BIL funding has increased the likelihood that there will be contracts subject to both laws. Application of both the BAA and BAP for a single acquisition would unnecessarily result in burdensome, inefficient and costly procurement practices. Furthermore, it increases barriers for small disadvantaged businesses (SDBs) to participate in BIL funded projects, and may adversely impact the FAA's goal to increase SDB awards. Including both BAA and BAP requirements to an acquisition create hardships for the bidding public, contractors and FAA personnel.

The intent of this public interest waiver is to eliminate inefficiencies in FAA acquisitions and to improve the FAA's and vendors' ability to promote and comply with Buy America principles. Accordingly, all future FAA contracts with both BIL funds and other funds or involving activities otherwise subject to the provisions of BAP, will adhere fully to the provisions of the BAA, waiving application of BAP in those instances.

Findings

- (1) In Accordance with Policy section 3.1.1 of the AMS "the goal of the Federal Aviation Administration procurement system is to obtain high quality products, services, construction, and real property in a timely, cost-effective manner, at prices that are fair and reasonable." Further, in accordance with AMS Policy section 3.1.3 Fundamental Principles part (e), the FAA's procurement system will "provide streamlined methods and initiate innovative processes to conduct timely and cost-effective procurements."
- (2) For purposes of the BAP, in most recent years, including FY-2021, all procurements for F&E were funded via the Airport and Airways Trust Fund (AATF). With few exceptions, all acquisitions funded by the AATF are subject to BAP. Thus, nearly all of the FAA's acquisitions for F&E must adhere to BAP. As many future F&E acquisitions will be funded using appropriations from both AATF and BIL, many of these acquisitions would be subject to both BAA and BAP.
- (3) At present, the difference between the BAA and BAP is subtle. There are differences in the values attached to the component test, but when the component test applies, and to what it applies makes it difficult to determine which law is "more strict." To complicate things, pursuant to the directives of section 8 of Executive Order (EO) 14005 of January 25, 2021 (Ensuring the Future Is Made in All of America by All of America's Workers), the BAA will increase the numerical threshold for domestic content requirements in a few months.³ Thus, choosing to apply the "more strict" standard is equally as difficult.

³ Exec. Order No. 14005, 86 FR 7475 (Jan. 28, 2021).

Instead, we look to other considerations. Here, BIL funding is “once in a generation” funding with high, political visibility. In addition, in its issuing of EO 14005 the Administration has made very clear its intentions in strengthening Buy American laws, and has followed-through by implementing its FAR-rule with graduated made-in-America requirements. Also, BIL funding comes with extensive tracking/oversight and Buy American coordination.⁴ While the FAA is prohibited from applying the FAR and laws authorizing implementation in the FAR to its acquisitions, 49 U.S.C. §40110(d), it is clear that Congress desired consistent application and reporting on the BAA across all BIL-funded acquisitions. Based on these considerations, it is reasonable to apply BAA requirements over BAP in contracts utilizing BIL-funding.

- (4) Although Buy America laws are important labor protections with economic benefits, they also impose significant costs to vendors which, as part of their overhead costs, are ultimately passed to the Federal Government. As the BAA and BAP consist of different standards, vendors will be persistently burdened with making the confusing and difficult determination of which Buy American provisions apply. These additional burdens will increase the already high costs of compliance. Congress was aware of this type of risk, and expressed concern with FAA procurement policies that diverged from those of other FAR-bounded agencies as divergence could counterproductively lead to confusion and increased costs.⁵ Thus, it is essential that, in certain instances such as this, the FAA use the flexibility of AMS to select the most reasonable course of action. Here, it is aligning itself with the procurement policies of other agencies. Requiring public contractors to comply with one standard for BIL-funded projects is a cost-effective, streamlined, rational and reasonable method of conducting acquisitions.
- (5) After performing a harmonization of the two Acts, counsel identified that, at the base level, the primary distinction between the two domestic preference Statutes is how each is configured. The BAP applies unless a waiver is granted; the BAA, on the other hand, has specifically recognized carve outs depending on type of acquisition. In addition, BAA’s waiver process only applies to certain purchases. For these reasons, the BAP might be considered slightly “more strict” because of the increased level of oversight associated with internal waivers. As stated above, though, BIL has instituted additional review requirements applicable to waiver oversight. Under BIL, BAA waivers will be reviewed and published according to guidance from the Made in America Office (MIAO). However, per EO 14005 and implementing guidance from MIAO, additional review requirements also apply to waivers based on non-availability under BAP, and MIAO review requirements are anticipated to expand for other types of waivers. For this reason, application of the two laws is substantially the same and achieves the underlying purpose of strengthening the domestic supply chain, and ensuring that goods are manufactured in the United States.

⁴ Public Law No: 117-58, §§ 70921-70941.

⁵ 141 Cong. Rec. 12062 (1995).

- (6) The FAR Council has expanded upon the BAA, adding specifics to the Act (e.g., the component test, definitions of domestic end product, etc.), but the FAA is prohibited from following the FAR unless expressly adopted by the AMS. Instead, Congress included what it deemed necessary for FAA procurements, and left the rest to the BAP's waiver process.
- (7) By establishing a streamlined, singular Buy American standard to BIL-funded contracts, contracting staff will be trained on compliance with one standard, and responsible for enforcing only it. This will make FAA's coordination with Made In America Office (MIAO) more accurate and efficient. And, more importantly, will result in more transparent and straightforward made-in-America reporting.

Waiver

The intent of the AMS is to afford the FAA flexibility in its acquisition practices that are capable of addressing the agency's unique need for efficient procurements. In enacting BAP, Congress' expressed intent was to afford the FAA the ability to waive its requirements when doing so would be in the public interest. The findings above indicate that a waiver is appropriate as applying both the BAA and BAP to an acquisition would be an unnecessarily burdensome, inefficient and costly practice that would not further the interests of Buy American policy. Therefore consistent with public interest, I waive the requirements of 49 U.S.C. §50101 for all FAA contracts that use Bipartisan Infrastructure Law appropriations and also use funds and or include activities otherwise obligated to the provisions of Buy American Preference.

I do so with the authority granted to the Secretary of Transportation by 49 U.S.C. §50101(b) and delegated to me by the FAA Administrator through memorandum dated April 3, 2012.

This Waiver is valid until expressly rescinded.

Nathan Tash

Deputy Assistant Administrator for Acquisition & Business
Services and FAA Acquisition Executive

Date