

## STRENGTHENING MOBILITY AND REVOLUTIONIZING TRANSPORTATION (SMART) GRANT PROGRAM GRANT RECIPIENT DOMESTIC PREFERENCE REQUIREMENTS GUIDANCE

### SMART Domestic Preference Requirements

As expressed in Executive Order 14005, *Ensuring the Future Is Made in All of America by All of America's Workers* (86 FR 7475),<sup>1</sup> the Executive Branch should maximize, consistent with law, the use of goods, products, and materials produced in, and services offered in, the United States.

SMART Grants projects that are considered “projects for infrastructure” will be subject to the domestic preference requirements at § 70914(a) of the Build America, Buy America (BABA) Act (Pub. L. No. 117-58, div. G, tit. IX, subtit. A, 135 Stat. 429, 1294 (2021)) and Office of Management and Budget (OMB) Memorandum M22-11, “Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure.”<sup>2</sup>

Projects that are not considered “projects for infrastructure” will be subject to requirements of the Buy American Act (“BAA”) (Pub. L. No. 72-428, as codified at 41 U.S.C. §§ 8301-8303).

Note that when using SMART Grants funds, Buy America (49 U.S.C. 5323(j) (formerly sec. 165 of the Surface Transportation Assistance Act of 1982 (Pub. L. 97-424)) provisions do not apply.

### Build America Buy America Act (BABA)

The Office of Management and Budget (OMB) recently revised the OMB Guidance for Grants and Agreements to “provide further guidance on implementing the statutory requirements and improve Federal financial assistance management and transparency”<sup>3</sup> for Build America, Buy America. To review the final guidance, navigate to the final [rule posted in the Federal Register](#).

Depending on the scope of a SMART Grants project, the entire project or aspects of the project may be considered a “project for infrastructure.” These projects or aspects of projects that are considered a “project for infrastructure” are subject to BABA.

To view the Waiver of Buy America Requirements for De Minimis Costs and Small Grants, review the [Notice posted in the Federal Register](#).

### Buy American Act (BAA)

Depending on the scope of a SMART Grants project, the entire project or aspects of the project may not be considered a “project for infrastructure.” These projects or aspects of projects that are not considered a “project for infrastructure” are subject to the Buy American Act (“BAA”). This means that the procurements associated with your SMART project are subject to the provisions associated with the BAA that are included in the Federal Acquisition Regulations (FAR). Your team should review these provisions in advance of procurement actions. Considering the focus of the SMART Grants Program, the following waivers detailed in the FAR may be relevant:

- 1) Commercially available off-the-shelf (COTS) item waiver

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<sup>1</sup> <https://www.federalregister.gov/documents/2021/01/28/2021-02038/ensuring-the-future-is-made-in-all-of-america-by-all-of-americas-workers>

<sup>2</sup> <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>

<sup>3</sup> [https://www.whitehouse.gov/wp-content/uploads/2023/08/REV\\_2-CFR-Guidance-Pre-publication-version-8.13.pdf](https://www.whitehouse.gov/wp-content/uploads/2023/08/REV_2-CFR-Guidance-Pre-publication-version-8.13.pdf)

2) Commercial IT waiver

Definitions

| Item                                                                                                                 | Definition                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
|----------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Commercially available off-the-shelf (COTS) item</p> <p><b>FAR Citation</b><br/><a href="#">Subpart 2.101</a></p> | <p>“(1) Means any item of supply (including construction material) that is–</p> <ul style="list-style-type: none"> <li>(i) A commercial product (as defined in paragraph (1) of the definition of “commercial product” at Federal Acquisition Regulation (FAR) <a href="#">2.101</a>);</li> <li>(ii) Sold in substantial quantities in the commercial marketplace; and</li> <li>(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and</li> </ul> <p>(2) Does not include bulk cargo, as defined in <a href="#">46 U.S.C.40102(4)</a>, such as agricultural products and petroleum products.”</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| <p>Information technology</p> <p><b>FAR Citation</b><br/><a href="#">Subpart 2.101</a></p>                           | <p>“Information technology means any equipment, or interconnected system(s) or subsystem(s) of equipment, that is used in the automatic acquisition, storage, analysis, evaluation, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the agency.</p> <p>(1) For purposes of this definition, equipment is used by an agency if the equipment is used by the agency directly or is used by a contractor under a contract with the agency that requires-</p> <ul style="list-style-type: none"> <li>(i) Its use; or</li> <li>(ii) To a significant extent, its use in the performance of a service or the furnishing of a product.</li> </ul> <p>(2) The term "information technology" includes computers, ancillary equipment (including imaging peripherals, input, output, and storage devices necessary for security and surveillance), peripheral equipment designed to be controlled by the central processing unit of a computer, software, firmware and similar procedures, services (including support services), and related resources.</p> <p>(3) The term "information technology" does not include any equipment that-</p> <ul style="list-style-type: none"> <li>(i) Is acquired by a contractor incidental to a contract; or</li> <li>(ii) Contains imbedded information technology that is used as an integral part of the product, but the principal function of which is not the acquisition, storage, analysis, evaluation, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. For example, HVAC (heating, ventilation, and air conditioning) equipment, such as thermostats or temperature control devices, and medical equipment where information technology is integral to its operation, are not information technology.” </li></ul> |

## Waiver Information

| Waiver Type                                                                                                            | Details                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
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| <p>Commercially available off-the-shelf (COTS) item waiver</p> <p><b>FAR Citation</b><br/><a href="#">52.225-1</a></p> | <p><a href="#">41 U.S.C. chapter 83</a>, Buy American, provides a preference for domestic end products for supplies acquired for use in the United States. In accordance with <a href="#">41 U.S.C. 1907</a>, the domestic content test of the Buy American statute is waived for an end product that is a COTS item (see <a href="#">12.505(a)(1)</a>), except that for an end product that consists wholly or predominantly of iron or steel or a combination of both, the domestic content test is applied only to the iron and steel content of the end product, excluding COTS fasteners." that consists wholly or predominantly of iron or steel or a combination of both, the domestic content test is applied only to the iron and steel content of the end product, excluding COTS fasteners."</p> |
| <p>Commercial IT waiver</p> <p><b>FAR Citation</b><br/><a href="#">Subpart 25.103</a></p>                              | <p>" When one of the following exceptions applies, the contracting officer may acquire a foreign end product without regard to the restrictions of the Buy American statute: [...]</p> <p>(e) <i>Information technology that is a commercial product.</i> The restriction on purchasing foreign end products does not apply to the acquisition of information technology that is a commercial item, when using fiscal year 2004 or subsequent fiscal year funds."</p>                                                                                                                                                                                                                                                                                                                                       |