



Build America, Buy America Act

Are your contractors compliant?

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The Obligatory Disclaimer

This presentation does not, and is not intended to, constitute legal advice; instead, all information, content, and materials are for general informational purposes only. Information may not constitute the most up-to-date legal or other information. You should contact your counsel with any project-specific question or concerns regarding compliance with federal laws and regulations.

Today's Discussion Overview

The Infrastructure Investment and Jobs Act

Build America, Buy America Act (BABAA)

Waivers

Public Infrastructure Projects & Categories

Best Practices for Contractors

The Infrastructure Investment and Jobs Act

**Between the Infrastructure Investment and Jobs Act
and the Inflation Reduction Act (IRA),**

the 117th Congress invested **\$1.25 trillion
across the transportation, energy, water resources, and
broadband sectors for the next five to 10 years.**

Much of the funding has yet to be allocated or remains as unrealized tax credits on the federal balance sheet.

The Infrastructure Investment and Jobs Act

- It established a **domestic content procurement preference** for all Federal Financial Assistance obligated for infrastructure projects after May 14, 2022.

May 2022						
S	M	T	W	T	F	S
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				



**The Infrastructure Investment
and Jobs Act
paved the way for the
Build America, Buy America Act**

The Build America, Buy America Act

BABAA was enacted as part of the **Infrastructure Investment and Jobs Act** on **November 15, 2021**.



BABAA is a permanent law that requires projects using federal infrastructure grants MUST USE materials produced in the United States.



The Build America, Buy America Act

- BABAA focuses on maximizing the federal government's use of services, goods, products, and materials produced and offered in the United States.
- Requires that iron, steel, construction materials, and manufactured products used in infrastructure projects be produced in the United States.



The Infrastructure Investment and Jobs Act generally requires Federal agencies to:

“Ensure that none of the funds made available for a Federal financial assistance program for infrastructure, including each deficient program, may be obligated for a project **unless** all the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.”

“Infrastructure” Defined

- Any project that include construction, alteration, maintenance, or repair of infrastructure, regardless of whether infrastructure is the primary purpose of the project.
- The requirement to use American made iron and steel, construction materials, and manufactured products applies to funding from Community Development Block Grant (CPD) programs for infrastructure projects.



The Infrastructure Investment and Jobs Act

Provides new funding for infrastructure projects:

1. Roads, bridges, and highways
2. Public transportation
3. Dams, ports, harbors and maritime facilities
4. Intercity passenger and freight railroads
5. Freight and intermodal facilities
6. Airports
7. Utilities
8. Water systems (including drinking water and wastewater systems)
9. Electrical transmission facilities and systems
10. Broadband infrastructure
11. Buildings and real property
12. Structures, facilities, and equipment that generate, transport, and distribute energy including electric vehicle (EV) charging

Why Was the Act Enacted?

- 1. Stimulate** private sector investments in American manufacturing,
- 2. Bolster** critical American supply chains, and
- 3. Support** the creation of jobs so that America's workers and firms can compete and lead globally for years to come.

Buy America Preference (BAP) Basic Requirements

The BAP is applicable to all to all Federal infrastructure spending.

- It requires any infrastructure project funded by federal financial assistance to apply a domestic content procurement preference, meaning that:
 - All iron, steel, manufactured products, and construction materials used in the infrastructure project have been produced in the United States, unless the awarding agency has issued a waiver of this requirement.



BABAA and HUD Recipients

- In section 70912, the Act further defines a project to include “the construction, alteration, maintenance, or repair of infrastructure in the United States” and includes within the definition of infrastructure those items traditionally included along with buildings and real property.
- Demolition alone is not considered an infrastructure activity and is not subject to the Buy America Preference (BAP). However, if demolition is a part of a larger infrastructure project that includes construction, alteration, maintenance, or repair, the entire project may be subject to BAP.

Build America, Buy America Act

Title IX of BABAA requires federal infrastructure programs to provide for the use of materials produced in the United States.



Each federal agency must submit to the Office of Management and Budget (OMB) and to Congress a report that identifies each federal financial assistance program (*i.e.*, grants, cooperative agreements, non-cash contributions or donations of property, direct assistance, loans, loan guarantees), for infrastructure administered by the agency and...

1. Identify domestic content procurement preferences applicable to the assistance.
2. Assess the applicability of such requirements.
3. Provide details on any applicable domestic content procurement preference requirement.
4. Include a description of the type of infrastructure projects that receive funding under the program.

Build America, Buy America Act *(continued)*



- Each agency shall ensure that **none of the funds made available for such a program are used for a project unless all of the iron, steel, and manufactured products used in the project are produced in the United States.**
- Agencies may waive these requirements where requirements are:
 - ✓ Inconsistent with the public interest,
 - ✓ Not produced in sufficient quantities or satisfactory quality, or
 - ✓ Such inclusion will increase the cost of the project by more than 25%.
- The total cost of a project includes all the work that goes into that project, regardless of the number of contracts or funding sources involved.

Build America, Buy America Act *(continued)*



- Title IX of the Act also directs the Office for Federal Procurement Policy in the OMB to promulgate final regulations or other policy guidance to standardize and simplify how federal agencies comply with, report on, and enforce the **Buy American** Act.
- Further, Title IX directs specified federal agencies to take steps to increase transparency and **limit the use of waivers** of Buy American laws.
- Generally, Buy American laws require agencies to procure domestic goods.



Buy Americann Act vs. BABAA: *What's the Difference?*

BUY AMERICAN ACT	BUILD AMERICA, BUY AMERICA ACT
What Federal Funding Does the Requirement Apply To?	
Direct <i>Federal procurement</i> – what the Federal government buys for its own use.	Domestic content requirements that apply to certain Federal financial assistance programs (Title IX).
What is the Requirement?	
Requires a preference for domestic end products (<i>i.e.</i> , an article, material, or supply to be to be acquired for public use) and domestic construction.	There is no single “Buy America” statute. However, BABAA is the most expansive statute (<i>i.e.</i> , covering multiple agencies and domestic content preferences), requiring that financial assistance programs for infrastructure utilize American-made iron, steel, construction materials, and manufactured products.



October 2023: OMB Issues Final Rule

The scope of the new regulations is broad.

- The regulations apply to all federal awards, including any subawards, contracts and purchase orders for work performed, or products supplied under the federal award, where federal funds are appropriated or otherwise made available for **infrastructure projects in the United States**, regardless of whether infrastructure is the primary purpose of the Federal award.

2 C.F.R. § 184.3 and § 184.4(a) through (d).

- The Act applies to any grantee, subrecipient, contractor, or vendor carrying out or assisting with a project or activity using federal financial assistance.

Broad Definition of “Infrastructure Project”

- An “infrastructure project” is defined as:

“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.”

2 C.F.R. § 184.3.



This is a very broad definition,
and the Office of Management and Budget (OMB)
intends for it to be
construed expansively.

2 C.F.R. § 184.4(d).

Broad Definition of “Infrastructure Project” *(continued)*

- Federal agencies are told to “interpret the term ‘infrastructure’ broadly” and, when doing so:

“Consider whether the project will serve a public function, including whether the project is publicly owned and operated, privately operated on behalf of the public, or is a place of public accommodation, as opposed to a project that is privately owned and not open to the public.”

2 C.F.R. § 184.4(d)

Common Infrastructure Projects

Construction, alteration, maintenance, or repair of 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
- Utilities
- Airports
- Water systems (drinking water and wastewater systems)
- Electrical transmission facilities and systems
- Broadband infrastructure
- Buildings and real property

Buy America Preference (BAP) Implementation



- HUD chose to initially implement the BAP for all iron and steel products used in CDBG infrastructure projects using funding obligated on or after November 15, 2022.
- The specific focus on iron and steel in infrastructure projects will gradually extend to encompass the full implementation of the BAP across all HUD programs.
- Final implementation on all covered materials goes into effect August 23, 2024.



Phased Implementation

Program	FY23 Q1	FY23 Q2	FY23 Q3	FY23 Q4	FY24 Q1	FY24 Q2	FY24 Q3	FY24 Q4	FY25 Q1
CDBG Formula Grants	● 11/15/22 Iron and steel								
					FY24 Obligation Date (Varies) Construction materials – Specifically-Listed			FY25 Obligation Date (Varies) Construction materials – Not Listed Manufactured products	
Healthy Homes*		● 2/22/23 Iron and steel							
									● 8/23/24 • All construction materials • Manufactured products
Recovery Housing Program ("RHP") Grants				● 8/23/23 Iron and steel					
					FY24 Obligation Date (Varies) Construction materials – Specifically-Listed			FY25 Obligation Date (Varies) Construction materials – Not Listed Manufactured products	
All other HUD FFA**						● 2/22/24 Iron and steel			
									● 8/23/24 • All construction materials • Manufactured products
HOME***									● 8/23/24 • Iron and steel • All construction materials • Manufactured products

*Choice Neighborhood, Lead Hazard Reduction, and Healthy Homes Production Grants

**All other HUD FFA except HOME, Housing Trust Fund, and Public Housing FFA used for maintenance projects

***HOME, Housing Trust Fund, and Public Housing FFA used for maintenance projects

BABAA Implementation Notice – 6 Steps

1. Are the funds being used for an “infrastructure project”?
2. Does the project use FFA?
3. Does the project use products subject to the BAP?
4. Were funds obligated on or after the effective date of the BAP?
5. Is the project covered in whole or part by any of the HUD general waivers?
6. Could the project qualify for a project-specific waiver?



Determining Whether BABAA Applies to You

	Funding Obligated by HUD	That is	Federal Financial Assistance (FFA)	Provided to	Non-Federal Entities	For an	Infrastructure Project
Requires Compliance	<p>HUD obligated the funding or obligated by operation of law (regardless of the point of obligation by the funding recipient/grantee) after the date of:</p> <ul style="list-style-type: none"> • May 14, 2022, or • The expiration of an applicable waiver (currently May 22, 2024, for Tribal recipients) • Phased implementation starting February 22, 2023, and March 15, 2023, through August 23, 2024. 		<ul style="list-style-type: none"> • Grants; • Cooperative agreements; • Non-cash contributions or donations of property (including donated surplus property); • Direct appropriations; • Food commodities; • Loans; • Loan Guarantees; • Interest subsidies; • Insurance, and • Other financial assistance 		<ul style="list-style-type: none"> • State; • Local government; • Indian tribe; • Institution of Higher Education (IHE); • Nonprofit organization that carries out a Federal award as recipient or subrecipient. 		<p>Construction, alteration, maintenance, or repair of:</p> <p>structures, facilities, and equipment for:</p> <p>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.</p>
Does NOT Apply	<p>Funding obligated HUD or by operations of law before the date of:</p> <ul style="list-style-type: none"> • May 14, 2022, or • The expiration of an applicable waiver (currently May 22, 2024, for Tribal recipients) • Phased implementation starting February 22, 2023, and March 15, 2023, through August 23, 2024. 		<ul style="list-style-type: none"> • Amounts received as reimbursement for services rendered to individuals • Expenditures for assistance authorized in the Robert T. Stafford Disaster Relief and Emergency Assistance Act, or relating to a major disaster or emergency declared by the President or • Pre and post disaster or emergency response expenditures 		<ul style="list-style-type: none"> • Private individuals • Private, for-profit entities 		<ul style="list-style-type: none"> • Payments for activities that are not construction, alteration maintenance or repair, e.g., Rental assistance payments and other payments for services • Purchase money mortgages/financing

What goes into building “Infrastructure”?



Four Infrastructure Materials Categories

1	2	3	4
Iron or Steel Products	Manufactured Products	Construction Materials	Section 70917(c) Materials

An item **will not fall into more than one of these four categories and may not fall under any of these categories**. The determination of which category an item falls into is “based on its status at the time it is brought to the work site for incorporation into an infrastructure project. In general, the work site is the location of the infrastructure project at which the iron, steel, manufactured products, and construction materials will be incorporated.”

Four Infrastructure Materials Categories *(continued)*


1	2	3	4
Iron or Steel Products	Manufactured Products	Construction Materials	Section 70917(c) Materials

All manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.

Note that to determine whether a product is considered to be “iron or steel”, HUD considers the terms “predominantly” and “primarily” to be interchangeable. “Predominantly” means the cost of the iron and steel content exceeds 50% of the total cost of all the item’s components.

2. Manufactured Products

1	2	3	4
Iron or Steel Products	Manufactured Products	Construction Materials	Section 70917(c) Materials



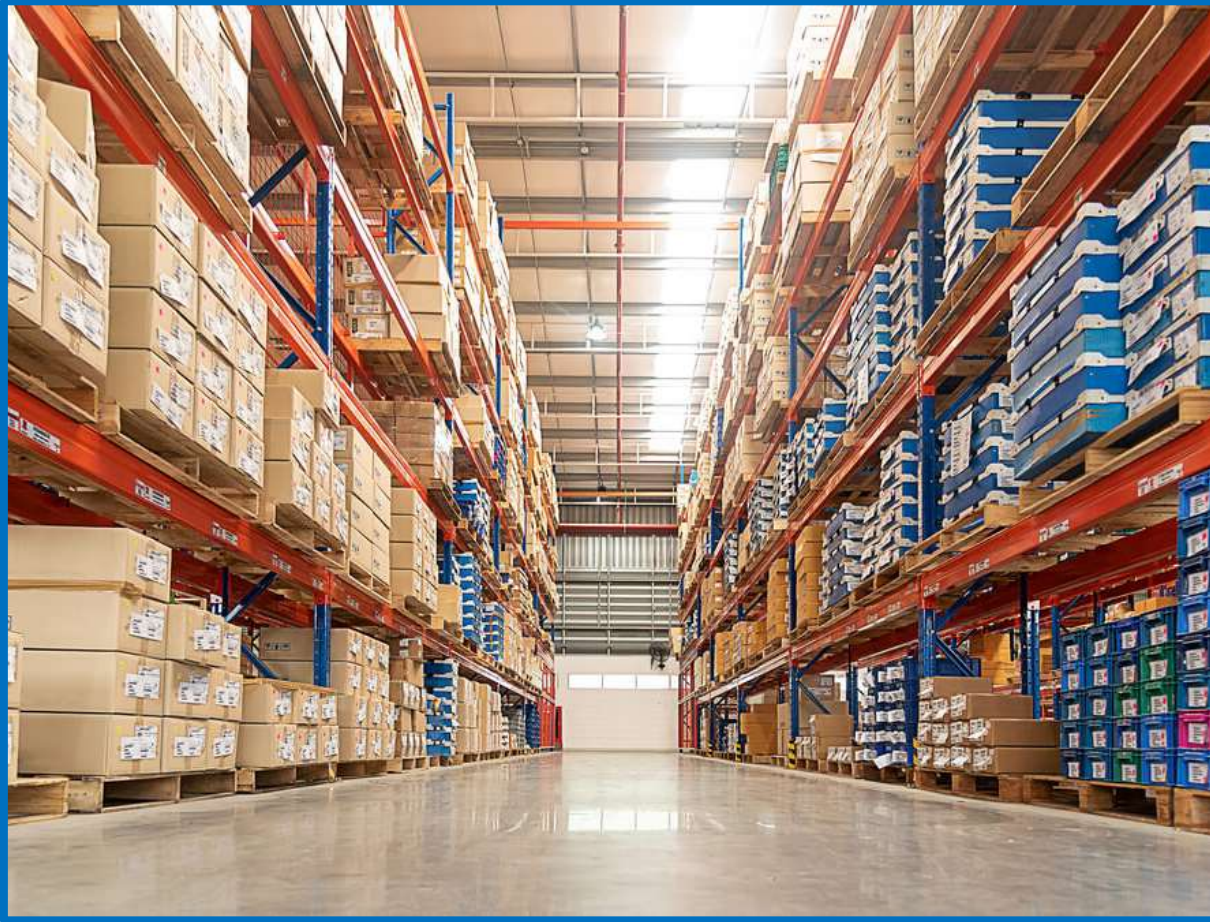
- As defined in 2 CFR § 184.3, “manufactured product” means articles, materials, or supplies that have been either:
 - Processed into a specific form or shape.
 - Combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies.
 - The products must be manufactured (assembled) in the United States, and the cost of components that were mined, produced, or manufactured in the United States must be greater than 55% of the total cost of all components of the project.

3. Construction Materials

1	2	3	4
Iron or Steel Products	Manufactured Products	Construction Materials	Section 70917(c) Materials

- Non-ferrous metals
- Plastic, PVC, other polymers
- Glass
- Lumber
- Drywall
- Requirements do not apply to tools, equipment and supplies brought to a construction site (ex. cranes, hammers, scaffolding)

Commercially Available Off-the-Shelf (“COTS”)




Under the Federal Acquisition Regulations, a **commercially available off-the-shelf (COTS)** item is any supply item (including a construction material) that is sold in substantial quantities in the commercial marketplace and used without modification in the same form in which it is sold.

4. Construction Materials

(continued)

1	2	3	4
Iron or Steel Products	Manufactured Products	Construction Materials	Section 70917(c) Materials



- Materials incorporated into the infrastructure projects must be U.S.-sourced:
 - Non-ferrous metals
 - Plastic and polymer-based products
 - Glass
 - Fiber optic cable
 - Optical fiber
 - Lumber
 - Drywall
 - Engineered wood

Construction Material Standards Defined

All occurred
in the
United
States



■ Non-ferrous metals

- All manufacturing processes, from initial smelting or melting through final shaping, coating, and assembly.

■ Plastic and polymer-based products

- All manufacturing processes, from initial combination of constituent plastic or polymer-based inputs, or, where applicable, constituent composite materials, until the item is in its final form.

■ Glass

- All manufacturing processes, from initial batching and melting of raw materials through annealing, cooling, and cutting.

Construction Material Standards Defined

All occurred
in the
United
States



- **Fiber optic cable** (including drop cable)
 - All manufacturing processes, from the initial ribboning (if applicable), through buffering, fiber stranding and jacketing. All manufacturing processes also include the standards for glass and optical fiber, but not for non-ferrous metals, plastic and polymer-based products, or any others.
- **Optical fiber**
 - All manufacturing processes, from the initial preform fabrication stage through the completion of the draw.
- **Lumber**
 - All manufacturing processes, from initial debarking through treatment and planing.

Construction Material Standards Defined

All occurred
in the
United
States



■ Drywall

- All manufacturing processes, from initial blending of mined or synthetic gypsum plaster and additives through cutting and drying of sandwiched panels.

■ Engineered wood

- All manufacturing processes from the initial combination of constituent materials until the wood product is in its final form.



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Initiative & Supply Chains

- Strengthening Made in America policies will send clear market signals to give suppliers confidence that manufacturing in the U.S., with America's workers, will provide greater opportunities.
- It will support supply chain resilience, workforce development, production and innovation, and strong sustainability and labor standards at home and abroad.
- Ensuring Made in America laws are implemented clearly and consistently across government will support domestic suppliers in the six critical supply chains identified by President Biden.
(Executive Order (E.O.) 14017)



MADE IN
AMERICA.GOV

Initiative & Supply Chains

- Ensuring Made in America laws are implemented clearly and consistently across government will support domestic suppliers in the six critical supply chain assessments requested by President Biden to the Secretaries of each agency. (Executive Order (E.O.) 14017)
 1. Defense
 2. Health and Human Services
 3. Commerce and Homeland Security
 4. Energy
 5. Transportation
 6. Agriculture

Manufacturer's Certification

- Documentation provided by a Manufacturer, certifying that the items provided by Manufacturer meet the domestic preference requirements of BABAA.

BABAA Compliance Certification Checklist:

Step 1: Preparation

The "Contractor," "Subcontractor," "Seller," Or "Material Supplier," should collect country-of-origin information on all the materials and components of products. For those elements and items not satisfying the BABAA requirement, separate requests for BABAA waivers must be submitted.

Step 2: Assemble the Data

Create a table containing the country-of-origin for all materials and components of products employed in the project. Immediately below the material and product country-of-origin table, place the authorized and knowledgeable individual(s) signatory space and date over their printed name(s). Below each signature should appear the title of the certifying individual(s), the company's name, and the contact information including a telephone number and email address at which the individual(s) may be reached.

Step 3: Documentation

Prepare a document, either paper or electronic, on the letterhead of the company titled "BABAA Compliance Certification". Include the RUS project designation in the second line. Then insert the following statement:

I hereby certify that to the best of my knowledge and belief all Iron, Steel, Manufactured Products, and Construction Materials installed on this project by my company and by any and all subcontractors and suppliers for this project comply with the Build America, Buy America Act (BABAA) requirements of the Infrastructure Investment and Jobs Act of 2021 (Pub. L. 117- 58, §§ 70901-70953), or are the subject of a waiver approved by the Secretary of Agriculture or designee.

Step 4: Compilation

The information tabulated in step 2, Assemble the Data, for all materials and components of products employed in the project should then be inserted. Step 5: Certifying After compiling all information and documentation, each certifying individual(s) provides wet signature and date.

Step 5: Certifying

After compiling all information and documentation, each certifying individual(s) provides wet signature and date.

Buy America Certification

PID: _____ Project Name: _____
Project Description: _____

The undersigned Proposer hereby certifies on behalf of itself and all contractors (at all tiers) that it will meet Buy America requirements in 23 CFR 635.410, using one of the following provisions:

_____ **The product contains no steel or iron products manufactured outside the United States.** To be considered domestic, all steel and iron used and all products manufactured from steel and iron must be produced in the United States and all manufacturing processes, including application of a coating, for these materials must occur in the United States. Coating includes all processes that protect or enhance the value of the material to which the coating is applied. The Buy America process does not apply to this project. If there is ANY foreign steel or iron in your product you may not check this box.

_____ **The product has minimal use of steel or iron products manufactured outside the United States.** The Buy America regulation does "not prevent a minimal use of foreign steel and iron materials, if the cost of such materials used does not exceed one-tenth of one percent (0.1 percent) of the total contract cost or \$2,500, whichever is greater. For purposes of this paragraph, the cost is that shown to be the value of the steel and iron products as they are delivered to the project. If this minimal use clause applies to your project, then please provide documentation indicating that this requirement is being met. The Buy America process does not apply to your project.

_____ **The product has foreign steel or iron; a Buy America waiver is required.** ODOT may, but is not obligated to, seek a waiver of Buy America requirements if grounds for the waiver exist. However, Proposer certifies that it will comply with the applicable Buy America requirements if a waiver of those requirements is not available or not pursued by the Department. The waiver process can take time and the project may not move forward until a waiver is completed.

A false certification is a criminal act in violation of 18 USC 1001. Should this Agreement be investigated, Proposer has the burden of proof to establish that it is in compliance.

Proposer: _____
Signature of Authorized Official: _____
Name of Authorized Official: _____
Title: _____
Date: _____

Exemplar Certification for Proposers/Bidders

BABAA Waivers



Waivers

- HUD encourages early collaboration with project engineers, architects, design, and procurement experts to assist with the process of identifying and classifying materials for a project.



Waivers

- Use specific waivers strategically to cover products not sourced domestically.
- All specific waiver requests must include a detailed justification for the use of goods, products, or materials mined, produced, or manufactured outside the United States.
- A certification that there was a good faith effort to solicit bids for domestic products supported by terms included in requests for proposals, contracts, and nonproprietary communications with potential suppliers.

IIJA, § 70937(c)(2)(A)

General Waivers

- Grantees do not need to request HUD approval to use a general waiver but should maintain documentation of their determination that a general waiver applies in their project file.
- A memo from the procurement officer outlining the terms of the project compared to the terms of the general waiver should demonstrate good-faith compliance.
- The same documentation used to support other HUD waivers should suffice (i.e. COVID-era waivers)

Types of General Waivers

Small Grants

BABA requirements do not apply to infrastructure projects whose total cost is equal to or less than the current Simplified Acquisition Threshold of \$250,000. This waiver is currently in effect as of November 23, 2022.

Types of General Waivers

De Minimis

BABA requirements do not apply for a De Minimis portion of an infrastructure project, meaning a cumulative total of no more than 5 percent of the total cost of the iron, steel, manufactured products, and construction materials, up to a maximum of \$1 million. This waiver is currently in effect as of November 23, 2022.

Types of General Waivers

Exigent Circumstances

This waiver applies when there is an urgent need by a grantee to immediately complete an infrastructure project because of a “exigent circumstances,” or a threat to life, safety, or property of residents and the community. This waiver is currently in effect as of November 23, 2022.

Additional General Waivers

- Does not apply for HUD funds to Tribes, Tribally Designated Housing Entities, and other Tribal Entities covered by the public interest general waiver effective until May 23, 2024.
- After receiving Tribal feedback, HUD will implement BAP through an approach that does not serve as a major barrier to Tribal community efforts to develop infrastructure.
 - HUD's Phased Implementation Waiver does not apply to funds awarded to Tribes.
 - Effective Nov. 15, 2023, has provided a limited, 15-month waiver of BAP using federal financial assistance for infrastructure projects in the **Pacific Island Territories** to provide time for HUD to collect and analyze evidence to determine if a more targeted waiver of these requirements is in the public interest.

Implementation of Executive Order 14005



- The Federal Acquisition Regulatory Council, in connection with Executive Order 14005, **“Ensuring the Future is Made in America with All of America’s Workers,”** plans to issue a proposed rule to develop a new process for preferencing critical products that are in manufactured products or component parts, under the Buy American Act.
- This will leverage the buying power of the nearly \$600 billion in federal contracting to strengthen domestic supply chains for critical products.
- National Institute of Standards and Technology (NIST) Manufacturing Extension Partnership (MEP) provides a supplier scouting service that grantees, subrecipients, and contractors may use to conduct market research and identify manufacturers who can meet demand for American made products.

General De Minimus Waiver Explained

- The de minimis (minimum value) waiver gives grantees the flexibility to waive the “Buy America Preference (BAP)” for a 5% de minimis portion of materials used in a project if domestically produced equivalents cannot be identified, up to \$1 million.
 - To determine the de minimis project limit, first calculate the total cost of covered materials (iron and steel, construction materials, and manufactured products) used in the project. Then, find 5% of that total.
 - For example, if the total cost of materials in a project is \$450,000, and you are unable to locate a domestically produced material, you have the flexibility to procure up to \$22,500 in materials from foreign sources using the de minimis waiver.

Project Specific Waivers

- Project/product-specific waivers are available on a limited, case-by-case basis, after HUD's review, a public comment period, and final approval from the Office of Management and Budget Made in America Office (MIAO).
- If more than one federal agency is funding an infrastructure project, project-specific waivers will require coordination among those Federal agencies prior to a determination by the MIAO.

Public Interest Waiver

- This waiver is granted if requiring the use of the American made product would be inconsistent with the public interest.
- In their waiver application, Grantees should:
 - Explain how waiving the BABA requirement for this project or product serves the public interest.
 - Demonstrate definite impacts on the community if specific items, products, or materials are not utilized in an infrastructure project.

Non-Availability Waiver

- This waiver is granted if the product needed is not produced in the United States in sufficient quantities or of a satisfactory quality.
- In their waiver application, Grantees should:
 - Demonstrate that they have conducted market research and adequately considered alternate items that meet the definition of [Made in America](#).
 - Describe the due diligence performed, including information, quotes, and/or responses from manufacturers, distributors, or suppliers.

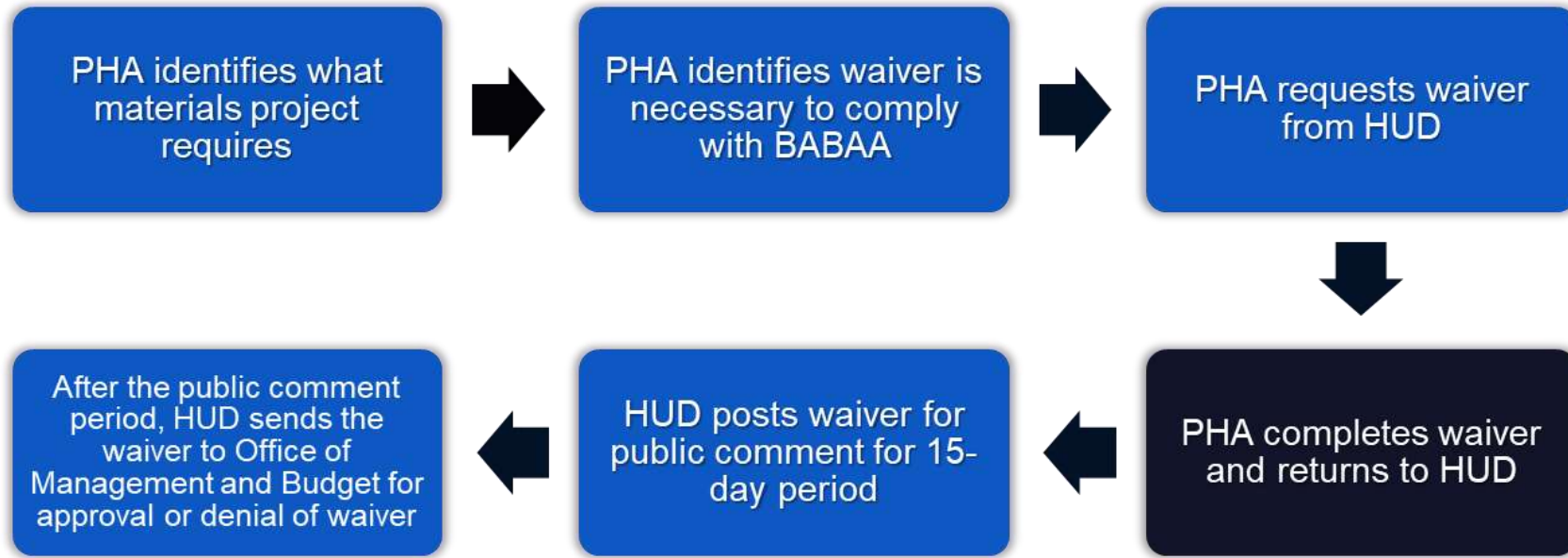
Unreasonable Cost Waiver

- This waiver is granted if the inclusion of the product produced in the United States will increase the cost of the overall project by more than 25 percent.
- In their waiver application, Grantees should:
 - Demonstrate that BABA compliance increases total project cost by more than 25%.
 - Determine the additional cost of BABA compliant products.
 - Determine the dollar amount to be waived.
 - Demonstrate that no domestic alternatives are available within the project budget.

How to Acquire and Submit Waiver

- PHA requesting the waiver must contact HUD.
- HUD will not only provide the waiver form but also provide guidance on the requirements of the waiver specific to the proposed project.
- Additionally, the waiver will be posted for public comment on the HUD website, and then be submitted to the Office of Management and Budget, who will then decide whether the waiver is granted or denied.

Waiver Process Explained



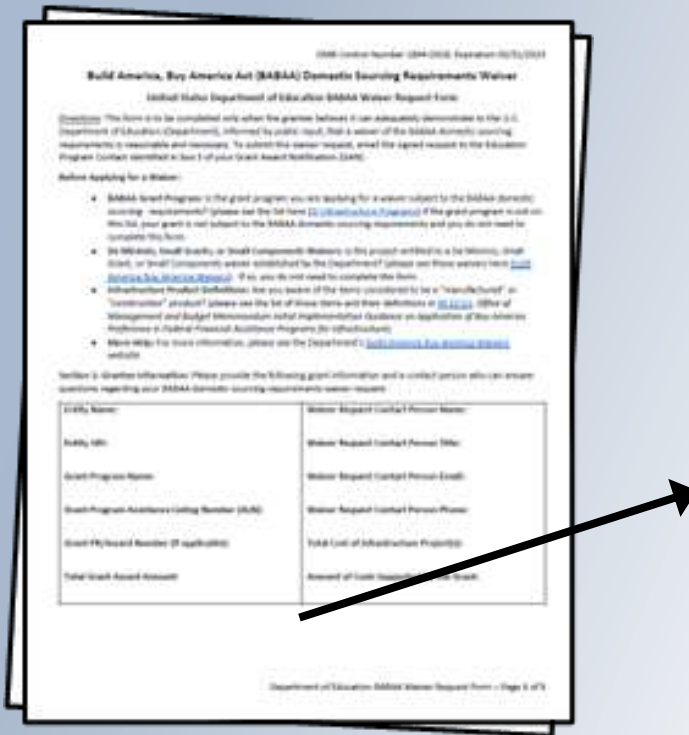
Waiver Requirements

- Waiver requests require certain information, including the following:
 - Entity name
 - Grant program name
 - Total grant amount
 - Contact person
 - Waiver timeline
 - Amount of costs supported by the grant
 - Infrastructure project description and location
 - Type of waiver being sought
 - **Justification narrative**

Justification Narrative – Heart and Soul of the Request

- The Justification Narrative describes the project in more detail, demonstrates why the waiver is necessary, and explains the adverse effects if the waiver is denied.
- It must contain one of the three exceptions necessary for the waiver, as well as supporting information:
- Public Interest – why it is in the best interest of the public to grant the waiver
- Non-Availability – why the materials are not available domestically, and what steps were taken to determine the unavailability
- Unreasonable Cost – why the use of domestic goods would increase total costs by more than 25% **with supporting research**

WAIVER EXAMPLE



Section 1: Grantee Information: Please provide the following grant information and a contact person who can answer questions regarding your BABA domestic sourcing requirements waiver request:

Entity Name:	Waiver Request Contact Person Name:
Entity UEI:	Waiver Request Contact Person Title:
Grant Program Name:	Waiver Request Contact Person Email:
Grant Program Assistance Listing Number (ALN):	Waiver Request Contact Person Phone:
Grant PR/Award Number (if applicable):	Total Cost of Infrastructure Project(s):
Total Grant Award Amount:	Amount of Costs Supported by this Grant:

WAIVER EXAMPLE

2024 Contract Number: 004-2024, Expiration: 03/31/2024

Build America, Buy America Act (BABAA) Domestic Sourcing Requirements Waiver
United States Department of Education BABAA Waiver Request Form

Section 4: Type of Waiver Requested: Please check only one of the following boxes.

We request a waiver of the BABAA domestic sourcing requirements because:

- Public Interest Waiver:** Applying the domestic content procurement preference would be inconsistent with the public interest (a “public interest waiver”).
- Nonavailability Waiver:** Types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality (a “nonavailability waiver”).
- Unreasonable Cost Waiver:** The inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25 percent (an “unreasonable cost waiver”).

Department of Education BABAA Waiver Request Form - (Page 3 of 3)

Section 4: Type of Waiver Requested: Please check only one of the following boxes.

We request a waiver of the BABAA domestic sourcing requirements because:

- Public Interest Waiver:** Applying the domestic content procurement preference would be inconsistent with the public interest (a “public interest waiver”).
- Nonavailability Waiver:** Types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality (a “nonavailability waiver”).
- Unreasonable Cost Waiver:** The inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25 percent (an “unreasonable cost waiver”).

Compliance is Key

- Remember PHAs are responsible for ensuring compliance with BABAA, regardless of whether performing the infrastructure project inhouse, or using a contractor.
- A breach of BABAA constitutes a violation of the terms and conditions of the grant agreement.
- Non-compliance carries stiff penalties, penalties including but not limited to: Reduction of grant award, reduction of future awards, and possible recission of grant.
- It is paramount that any grantee diligently ensure compliance with the requirements of BABAA and contact legal counsel with questions.

7 *Best* Practices When Dealing with Contractors





1. Contractor Best Practices



- Compliance with BABAA requirements is critical for the Contractor's bottom line.
- You should amend existing subrecipient agreements and contracts for funding (and future years) if they do not contain BABAA provisions.

2. Contractor Best Practices



- Get certification from your suppliers.
 - BABAA conditions applicable to HUD-funded projects require that the HUD grantee includes the BABAA conditions in any subaward or subcontract.
 - The grantee is responsible for ensuring that all subrecipients comply with BAP's requirements.
- Obtain supplier certification confirming that the construction materials or manufactured products comply with BABAA requirements.

3. Contractor Best Practices



- Construction contracts with subcontractors and suppliers should include **standard language** making these parties responsible for the cost of non-compliance with BABAA:

“The Grantee must comply with the requirements of the Build America, Buy America Act, 41 USC 8301 note, and all applicable rules and notices, as may be amended, if applicable to the Grantee’s infrastructure project. Pursuant to HUD’s Notice, “Public Interest Phased Implementation Waiver for FY 2022 and 2023 of Build America, Buy America Provisions as Applied to Recipients of HUD Federal Financial Assistance” (88 FR 17001), any funds obligated by HUD on or after the applicable listed effective dates, are subject to BABA requirements, unless excepted by a waiver.”

4. Contractor Best Practices



- Stay current with BAP changes, as the guidance is evolving.
- Pay close attention to bulletins issued by federal agencies such as the Office of Management and Budget and HUD.

5. Contractor Best Practices



- Conditions for waivers could change along with the types of construction materials subject to BABA.
- Exceptions to the rule may also change.
- Cement and aggregates are not considered manufactured products when they are used or combined at a work site, such as wet concrete or hot asphalt mix.
 - However, Section 70917(c) materials can be considered components of manufactured products if they are processed into a specific shape or form before being delivered to a work site.
 - For example, precast concrete is considered a manufactured product and is therefore subject to BAP.

6. Contractor Best Practices



- Don't count on a waiver.
 - BABAA is in place for a reason, so specific waivers will not be easy to obtain.
 - Perform your due diligence, be aware that the timing to implement BABAA requirements is not uniform for all federally funded infrastructure projects, and make sure BABAA requirements applicable to the project are met.

7. Contractor Best Practices



- Consider dedicating a person to BABAA oversight.
 - Documentation is key, so make sure you record all facts surrounding the job and BABAA compliance.
 - Task someone in your organization with tracking documentation or consider having a dedicated person in charge of compliance with BABAA.
 - HUD does not require a specific format for compliance tracking. Documentation may be maintained in hard copy, electronically, or embedded in construction or grants management software.

Consider Additional Contract Terms

- All products must meet BABAA requirements. Contractor shall include Manufacturer's Certification for BABAA requirements with all applicable submittals.
- If a specific manufacturer is used in the bidding, a statement that manufacturer will comply with BABAA must be included with the bid submission.
- Contractor shall comply with BABAA requirements, including coordination with manufacturers, distributors, and suppliers to correct deficiencies in any BABAA documentation.



Consider Additional Contract Terms *(continued)*

- Engineer/Architect approval of shop drawings or samples shall include review of BABAA documentation. Contractor shall certify upon completion that all work and materials have complied with BABAA requirements.
- For any change orders, Contractor shall provide BABAA documentation for any new products or materials required by the change.
- Installation of materials or products that are not compliant with BABAA requirements shall be considered defective work.



Consider Additional Contract Terms *(continued)*

- Contractor should ensure that Engineer/Architect has an approved Manufacturer's Certification or waiver prior to items being delivered to the project site.
- By submitting an application for payment, based in whole or in part on furnishing equipment or materials, Contractor certifies that such equipment and materials, to contractor's knowledge, are compliant with BABAA requirements.



Consequences for Contractors

Failure to comply with applicable BABAA requirements can result in...

- The need to remove and replace completed work at the Contractor's cost.
- Termination from the contract and potential debarment from performing federally funded work.
- Knowingly failing to comply with BABAA requirements can lead to liability under the False Claims Act, penalties can include treble damages.
 - Certain statutes require that after the jury has determined the amount of the plaintiff's actual damages, the court must award three times that amount.



Remember Ultimate Compliance Rests with You

- PHAs are responsible for ensuring compliance with BABAA, regardless of whether performing the infrastructure project in-house, or using a contractor.
- A breach of BABAA may constitute a violation of the terms and conditions of the grant agreement.
- Non-compliance carries stiff penalties, including but not limited to: reduction of grant award, reduction of future awards, and possible recission of grant.

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Build America, Buy America Act

Build America, Buy America Act requirements help boost the demand for American manufactured goods, strengthen critical American supply chains, and support the creation of American jobs.

Home > Programs > Build America, Buy America Act

Overview

The Build America, Buy America Act (BABA) requires that all iron and steel, construction materials, and manufactured products used in federally-funded infrastructure projects are produced in the United States. This requirement, known as the "Buy America Preference" (BAP), is detailed in the [Infrastructure Investment and Jobs Act, Pub. L. 117-58](#) and 2 CFR 184.

Community Planning and Development (CPD) grantees must work closely with subrecipients, developers, and contractors to ensure that products used in HUD-funded infrastructure projects are produced in the United States as required. Resource documents on this webpage are intended to assist CPD grantees and their partners in determining if BAP applies to their specific projects.

Policy Guidance and Notices

- [BABA on HUD.gov](#)
- [Notice CPD-23-12: BABA Implementation Guidance](#)
- [Waivers](#)
- [OMB Memo: M-24-02](#)
- [Buy American Act vs. Buy America Laws Fact Sheet](#)
- [What is Build America, Buy America? - OMB BABA FAQs](#)

Get Help

Get answers to your BABA questions.

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<https://www.hudexchange.info/programs/baba/>

Thank You



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