



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-5000

OFFICE OF PUBLIC AND INDIAN HOUSING

SPECIAL ATTENTION OF:

Office Directors of Public Housing;
Regional Directors; Public Housing
Agencies

2024-01pihn

Issued: January 3, 2024

Expires: This notice remains in effect until
amended, superseded, or rescinded.

Cross References: Sections 70901-52 of Pub. L. No.
117-58

**SUBJECT: BUILD AMERICA, BUY AMERICA IMPLEMENTATION GUIDANCE
FOR THE PUBLIC HOUSING PROGRAM**

1. PURPOSE

This Notice is intended to assist Public Housing Agencies (PHAs) by providing them with information about the “Buy America preference” (BAP) requirement created by the Build America, Buy America Act (BABA) and its impact on Public and Indian Housing (PIH) programs. This Notice also provides a timeline for the application of the BAP and highlights issues that PHAs may want to consider when preparing for HUD’s full implementation of the BAP over the next year.

Note: The guidance provided in this Notice is subject to change if the Office of Management and Budget (OMB) guidance on the application of BABA in Federal financial assistance (FFA) programs for infrastructure is updated. This notice does not apply to FFA provided to Tribes, Tribally Designated Housing Entities (TDHEs), and other Tribal Entities collectively referred to as "Tribal Recipients."

2. DATES

This Notice is effective upon publication.

3. BACKGROUND

A. Build America, Buy America

BABA was enacted on November 15, 2021, as part of the Infrastructure Investment and Jobs Act (IIJA). *See* Public Law 117-58, Sections 70901 - 70952; *see also* 41 U.S.C. § 8301 note. BABA established a domestic content procurement preference—the BAP—for certain infrastructure projects funded with Federal awards. Pursuant to Section 70914 of BABA, beginning May 14,

2022, HUD must ensure that any new FFA awards for an infrastructure program are covered under BABA, unless the application of BABA has been waived by HUD.

Under Section 70912(7) of BABA, the term “Project” means “the construction, alteration, maintenance, or repair of infrastructure in the United States” and includes buildings and real property within the definition of infrastructure (Section 70912(5)(K)).

Under Section 70914(b), HUD has authority to waive the application of the BAP when (1) application of the preference would be inconsistent with the public interest, (2) the materials and products subject to the preference are not produced in the United States in a sufficient and reasonably available quantity or satisfactory quality, or (3) the inclusion of such domestically produced materials and products would increase the cost of the overall Project by more than 25 percent. Section 70914(c) provides that a waiver under 70914(b) must be published by the agency with a detailed written explanation for the proposed determination and provide a public comment period of not less than 15 days.

On August 23, 2023, OMB issued a final rule for 2 CFR Parts 184 and 200 and provided further guidance on implementing the statutory requirements and improving FFA management and transparency. *See* 88 Fed. Reg. 57750 (effective October 23, 2023). These government-wide regulations apply to HUD programs and provide direction on implementing a BAP waiver process. The revised regulations also provided additional guidance on construction material standards, the cost components of manufactured products, and their definitions.

B. HUD’s Implementation of BABA

Since the enactment of BABA, HUD has worked diligently to implement the BAP. In order to ensure orderly implementation of the BAP across HUD’s programs, HUD published a number of general applicability waivers for HUD’s programs. Before BABA became effective on May 14, 2022, HUD established a Department-wide BABA leadership committee. Beginning in June 2022, HUD issued a Request for Information (RFI) and collected public comments on potential BABA implications for HUD grantees. Based on these comments and to ease the transition in complying with the BAP, HUD proposed and received four general waivers for covered FFA, which includes PIH programs. These waivers and other BABA information are available on HUD’s website at [BABA | HUD.gov / U.S. Department of Housing and Urban Development \(HUD\)](https://www.hud.gov/US-Department-of-Housing-and-Urban-Development). Further details on these waivers and their application to PIH programs is provided in the table below, which covers the waivers most relevant to the PIH programs as of the publication of this Notice.

Waiver Type	Purpose	Effective Dates
Public Interest Phased Implementation	HUD published a “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 Fed. Reg. 17001 (Mar. 15, 2023) that provided a schedule describing when the BAP would phase in and begin to apply to different programs.	The waiver was issued on March 15, 2023 and established a phased implementation schedule for the application of the BAP to HUD programs through FY2025. The BAP

Waiver Type	Purpose	Effective Dates
		has been in effect since November 15, 2022.
Exigent Circumstances	<p>HUD published a “Public Interest Waiver of Build America, Buy America Provisions for Exigent Circumstances as Applied to Certain Recipients of HUD Federal Financial Assistance.” 87 Fed. Reg. 76505 (Dec. 14, 2022). This waiver applies to Infrastructure Projects impacted by exigent circumstances and was put in place to prevent delays to critically important projects that serve to ensure the safety and health of HUD constituents while continuing to provide economic opportunity through housing and community development projects.</p>	This waiver went into effect on November 23, 2022, and is to remain in effect for five years unless HUD publishes a Notice altering the time period.
De Minimis, Small Grants, and Minor Components	<p>HUD published a “Public Interest De Minimis and Small Grants Waiver of Build America, Buy America Provisions as Applied to Recipients of HUD Federal Financial Assistance.” 87 Fed. Reg. 76502 (Dec. 14, 2022). This waiver effectively waives the BAP for infrastructure projects whose total cost (including HUD funding and funding from any other source) is an amount equal to or less than the 2 CFR 200.1 Simplified acquisition threshold, which is currently \$250,000. HUD also waived the application of the BAP for all Small Grants of FFA provided by HUD that are equal to or below the Simplified acquisition threshold. However, if the FFA covered by this waiver is combined with other funding, the waiver may cease to apply in certain circumstances outlined later in this notice. Additionally, HUD waives the application of the BAP 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 used in and incorporated into the infrastructure project, up to a maximum of \$1 million.</p>	This waiver went into effect on November 23, 2022, and is to remain in effect for five years unless HUD publishes a Notice altering the time period.
Tribal Recipients Waiver	<p>HUD published a “Tribal Recipient Waiver,” found in the notice, “General Applicability Waiver of Build America, Buy America Provisions as Applied to Tribal Recipients of HUD Federal Financial Assistance.” 87 Fed. Reg. 26221 (May 3, 2022). This waiver extended</p>	The initial Tribal Recipient Waiver became effective on May 14, 2022. On May 23, 2023, HUD published a subsequent Tribal Consultation Waiver that

Waiver Type	Purpose	Effective Dates
	<p>the implementation date for the BAP for FFA provided to Tribal recipients for a period of 1 year to provide time for appropriate Tribal Consultation on the application of the BAP to Tribal Recipients. This waiver made no funds obligated by HUD to Tribal Recipients before May 14, 2023, subject to the BAP. On April 12, 2023, HUD published a subsequent Tribal Recipients Waiver that extended the implementation date for the BAP until May 23, 2024. 88 Fed. Reg. 34514. Tribal consultation will inform any subsequent waiver and compliance requirements for future application of the BAP to Tribal Recipients.</p>	<p>extended the implementation date for the BAP until May 23, 2024.</p>

Additional details on HUD’s implementation of the BABA requirements, including proposed and existing waivers can be found at https://www.hud.gov/program_offices/general_counsel/BABA.

C. Incorporation of the BAP into Awards

BABA requirements will apply to HUD awarded FFA at different points in time depending on the program and when waivers delaying or otherwise impacting implementation of the BAP for HUD programs expire. HUD will include language in notices of funding opportunities (“NOFOs”) that will be published after this notice indicating that the BAP will potentially apply to grant awards made pursuant to those NOFOs. For obligations of HUD awarded FFA that are subject to the requirements of BABA (both pursuant to a NOFO and awarded through other mechanisms), HUD will communicate to recipients that their award is subject to the requirements of BABA and may also include provisions in grant agreements clarifying that the recipient must comply with BABA requirements, unless waived.

4. DEFINITIONS

The following terms are important to the appropriate interpretation and implementation of the BAP and BABA. Many of the following terms reference terms defined in OMB’s 2 CFR part 184 regulation that establishes a Federal government-wide regulatory framework for BABA. In instances where the terms below incorporate terms included in the 2 CFR part 184 regulation, the definition will note that the term is incorporated by reference from the 2 CFR part 184 regulation and will also restate the content of the definition from 2 CFR part 184 that was in effect as of the publication of this Notice. If OMB modifies a definition in 2 CFR part 184 after the publication of this Notice, the modified definition in 2 CFR part 184 will supersede the language included in this Notice.

Build America, Buy America Act is defined in 2 CFR 184.3 and means division G, title IX, subtitle A, parts I–II, sections 70901 through 70927 of the Infrastructure Investment and Jobs Act (Pub. L. No. 117-58)

Buy America Preference is defined in 2 CFR 184.3 and means the “domestic content procurement preference” set forth in section 70914 of BABA, which requires the head of each Federal agency to ensure that none of the funds made available for a Federal award for an infrastructure project may be obligated unless all of the iron, steel, manufactured products, and construction materials incorporated into the project are produced in the United States.

Component is defined in 2 CFR 184.3 and means an article, material, or supply, whether manufactured or unmanufactured, incorporated directly into: a manufactured product; or, where applicable, an iron or steel product.

Construction Materials. is defined in 2 CFR 184.3 and means articles, materials, or supplies that consist of only one of the items listed in paragraph (1) of this definition, except as provided in paragraph (2) of this definition. To the extent one of the items listed in paragraph (1) contains as inputs other items listed in paragraph (1), it is nonetheless a construction material.

(1) The listed items are:

- a. Non-ferrous metals;
- b. Plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables);
- c. Glass (including optic glass);
- d. Fiber optic cable (including drop cable);
- e. Optical fiber;
- f. Lumber;
- g. Engineered wood; and
- h. Drywall.

(2) Minor additions of articles, materials, supplies, or binding agents to a construction material do not change the categorization of the construction material.

Covered Materials is defined in 2 CFR 184.4(e) and includes the following when used in connection with an Infrastructure project:

- (1) all iron and steel;
- (2) all Manufactured Products; and
- (3) all Construction Materials.

Date of Obligation for BABA means, for funds obligated by HUD after the later of November 14, 2022, or the expiration of any applicable waiver of the application of the BAP, the date of obligation of the funds by HUD to a Grantee or Funding Recipient for an Infrastructure Project.

Domestic Content Procurement Preference is synonymous with “Buy America Preference” (BAP).

Federal Agency means any authority of the United States that is an “agency” (as defined in section 3502 of title 44, United States Code), other than an independent regulatory agency (as defined in that section). The U.S. Department of Housing and Urban Development is a Federal Agency.

Federal Financial Assistance (FFA) has the meaning given to the term in 2 CFR 200.1 (or successor regulations) and includes all expenditures by a Federal agency to a Non-Federal Entity for an Infrastructure Project, except that it does not include:

- (1) expenditures for assistance authorized under section 402, 403, 404, 406, 408, or 502 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170a, 5170b, 5170c, 5172, 5174, or 5192) relating to a major disaster or emergency declared by the President under section 401 or 501, respectively, of such Act (42 U.S.C. 5170, 5191); or
- (2) pre and post disaster or emergency response expenditures.

Force Account Labor means the use of directly hired permanent or temporary staff as an alternative method of carrying out eligible activities under the public housing Capital Fund grant program instead of procuring services through contract: for the purpose of this notice, use of Force Account Labor is considered to be a form of procurement. See 24 CFR 905.108 definition.

HUD Grantees/Funding Recipients means the Non-Federal entity that enters into an agreement with HUD in connection with the receipt of FFA through a HUD program, whether such funding is awarded pursuant to a competitive process, formula or non-competitive process.

Infrastructure as described in 2 CFR 184.4(c), encompasses public infrastructure projects in the United States, which includes, at a minimum: the structures, facilities, and equipment for roads, highways, and bridges; public transportation; dams, ports, harbors, and other maritime facilities; intercity passenger and freight railroads; freight and intermodal facilities; airports; water systems, including drinking water and wastewater systems; electrical transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property; and structures, facilities, and equipment that generate, transport, and distribute energy including electric vehicle (EV) charging. See also 2 CFR 184.4(d).

Infrastructure project is defined in 2 CFR 184.3 and means any activity related to the construction, alteration, maintenance, or repair of infrastructure in the United States regardless of whether infrastructure is the primary purpose of the project. See also [24 CFR 184.4](#)(c) and (d).

Iron or steel products is defined in 2 CFR 184.3 and means articles, materials, or supplies that consist wholly or predominantly of iron or steel or a combination of both.

Manufactured Products is defined in 2 CFR 184.3 and means:

- (1) Articles, materials, or supplies that have been:
 - a. Processed into a specific form and shape; or
 - b. Combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies.

- (2) If an item is classified as an iron or steel product, a construction material, or a section 70917(c) material under 2 CFR 184.4(e) and the definitions set forth in this section, then it is not a manufactured product. However, an article, material, or supply classified as a manufactured product under 2 CFR 184.4(e) and paragraph (1) of this definition may include components that are construction materials, iron or steel products, or section 70917(c) materials.

Manufacturer is defined in 2 CFR 184.3 and means the entity that performs the final manufacturing process that produces a manufactured product.

Non-Federal Entity means a State, local government, Indian Tribe, Institution of Higher Education (IHE), or nonprofit organization, as provided in 2 CFR 200.1. Public Housing Agencies are Non-Federal Entities.

Predominantly of iron or steel or a combination of both is defined in 2 CFR 184.3 and means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components.

Procurement means the acquiring by contract of supplies or services through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated.¹

Produced in the United States is defined in 2 CFR 184.3 and means:

- (1) In the case of iron or steel products, all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.
- (2) In the case of manufactured products:
 - a. The product was manufactured in the United States; and
 - b. The cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard that meets or exceeds this standard has been established under applicable law or regulation for determining the minimum amount of domestic content of the manufactured product. See 2 CFR 184.2(a). The costs of components of a manufactured product are determined according to 2 CFR 184.5.
- (3) In the case of construction materials, all manufacturing processes for the construction material occurred in the United States. See 2 CFR 184.6 for more information on the meaning of “all manufacturing processes” for specific construction materials.

¹ Language adapted from the Federal Acquisition Regulation (FAR) definition of procurement/acquisition at 48 CFR 2.101.

Program Office means the appropriate HUD Headquarters Office with delegated responsibility for administration of the FFA provided. This notice applies to the Office of Public and Indian Housing (PIH) Program Office.

Public Housing Agency (PHA) means any state, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage or assist in the development or operation of public housing, or a consortium of such entities or bodies as approved by the Secretary under the United States Housing Act of 1937 (1937 Act) and HUD regulations.

Section 70917(c) materials is defined in 2 CFR 184.3 and means cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives. *See* BABA, Section 70917(c).

5. IMPLEMENTATION GUIDANCE

On April 18, 2022, OMB issued guidance on the implementation of the BAP via memorandum, “Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure” (M-22-11). Subsequently, OMB published regulatory guidance on the implementation of BABA at 2 CFR Part 184, effective October 23, 2023. On October 25, 2023, OMB published memorandum M-24-02 titled, “Implementation Guidance on Application of Buy America Preference to Federal Financial Assistance Programs for Infrastructure” superseding its earlier M-22-11 memorandum. Consistent with OMB’s M-24-02 Memorandum and 2 CFR Part 184, HUD is providing this specific guidance necessary for PIH Grantees/Funding Recipients to properly apply the BAP in connection with FFA provided by HUD as the Cognizant Agency for BABA.

A. Applicability of BAP

Consistent with Section 70914 of BABA, HUD requires application of the BAP for all FFA that is obligated by HUD and provided to Non-Federal Entities after May 14, 2022, where the funds will be used to fund Infrastructure Projects unless the application of the BAP has been waived by HUD. HUD will require HUD Grantees/Funding Recipients to document compliance with the BAP where applicable and to ensure that the BAP is applied to all subgrantees and subrecipients of funding as well as other entities expending grant funds (including contractors and subcontractors paid with funding subject to the BAP), whether provided through contract, grant, loan, or other means, to which the BAP applies.

B. Implementation in Connection with Ongoing Projects

HUD has determined that for projects exclusively utilizing funds obligated by HUD prior to November 14, 2022, BABA does not apply.

HUD further waived application of BABA restrictions for all HUD programs other than formula grants awarded pursuant to the Community Development Block Grant program through February 21, 2023. (See “General Applicability Waiver of Build America, Buy America Provisions as

Applied to Recipients of HUD Federal Financial Assistance.” (87 Fed. Reg. 26219 (May 3, 2022)). For HUD Grantees/Funding Recipients that are Tribal entities, the BAP provisions of BABA have been waived for all funds obligated through May 23, 2024 (pursuant to the “Tribal Recipients” Waivers).

HUD has begun requiring compliance with the BAP as prescribed in its Public Interest Phased Implementation Waiver effective March 15, 2023. The waiver provides a table that describes the schedule for the application of BAP requirements. Any FFA that HUD obligates after the implementation point dates described in the waiver shall be subject to the BAP.

HUD may grant additional waivers of the BAP to avoid unnecessary disruption of HUD’s programs in the future. HUD will publish such waivers by notice. HUD will seek public comment on such waivers for a minimum of 15 days absent exigent circumstances. HUD may also extend the duration of existing waivers: in such instances HUD will seek public comment on such waivers for a minimum of 30 days absent exigent circumstances.

A complete list of BAP waivers will be published at https://www.hud.gov/program_offices/general_counsel/build_america_buy_america/waiver.

C. Incorporation by HUD Grantees and Funding Recipients

For FFA obligated by HUD after the implementation point dates enumerated in the Public Interest Phased Implementation Waiver, HUD Grantees/Funding Recipients must ensure that all procurements, subgrants, cooperative agreements, and inter-agency agreements they enter into incorporate requirements to ensure application of the BAP, unless the BAP has been waived for funds utilized in connection with an Infrastructure Project. The BAP requirements must be communicated to subgrantees, contractors and other entities prior to their purchasing products with grant funds subject to the BAP. The requirements must specify the record-keeping requirements with which the spender of grant funds will have to comply.

The requirements must also include a condition that the spender of funding subject to BABA must comply with BABA or seek waiver authorization prior to purchasing products that do not comply with BABA requirements unless such product purchases are already covered by a pre-existing waiver. For purposes of ensuring compliance with this requirement, the following language may be utilized, unless otherwise directed by specific program guidance:

Pursuant to the Build America, Buy America Act (BABA), enacted as part of the Infrastructure Investment and Jobs Act (IIJA). Pub. L. 117-58, 41 U.S.C. § 8301 note, the Federal Financial Assistance used to fund this infrastructure project is required to apply a domestic content procurement preference (the “Buy America Preference” or “BAP”) for all construction, alteration, maintenance, or repair of infrastructure, including buildings and real property, unless application of the BAP has been waived by HUD.

Additional details on fulfilling the BABA requirements can be found at https://www.hud.gov/program_offices/general_counsel/build_america_buy_america.

HUD Grantees/Funding Recipients may need to or elect to add funding that is subject to the BAP to an existing procurement, subgrant, cooperative agreement, or inter-agency agreement that was not subject to the BAP. As an example, a PHA initially awarded a procurement for \$225,000 that is not subject to the BAP because of HUD's De Minimis and Small Grant waiver; however, if the PHA later amends the procurement to add \$50,000, the result is an amended procurement amount of \$275,00 that exceeds the De Minimis and Small Grant waiver threshold of \$250,000. Because such situations can involve complex factors that may impact the applicability of BABA, HUD recommends that Grantees/Funding Recipients considering adding funding as outlined above to send an inquiry to BuildAmericaBuyAmerica@hud.gov describing the situation so that HUD can understand the situation and provide specific advice about how to proceed.

D. Scope of Infrastructure Project

HUD Grantees/Funding Recipients must identify and assess the scope of Infrastructure Projects in order to apply the BAP where it is required. In many instances, the requirement to apply the BAP will vary depending on the nature of and the scope of an Infrastructure Project. For instance, if the purpose of an Infrastructure Project is recovery from a Presidentially declared disaster under the Stafford Act (i.e., a post-disaster response expenditure), the BAP will not apply to the activity or activities that fall within the scope of the Infrastructure Project because the BAP does not apply to post-disaster response expenditures. In other instances, the size of funding dedicated to the Infrastructure Project may impact the applicability of the BAP. For instance, an Infrastructure Project that has less than \$250,000 allocated to it would not be subject to the BAP while HUD's De Minimis and Small Grants waiver implemented on November 23, 2022, remains in effect.

The size and scope of an Infrastructure Project shall be determined as follows:

For all PIH programs engaged in the construction, alteration, maintenance or repair of Public Housing, the scope of an Infrastructure Project is:

- (1) A procurement, subgrant, a cooperative agreement or inter-agency agreement that will result in the expenditure of funds to construct, alter, maintain or repair infrastructure;
- (2) Where applicable, a collection of procurements/cooperative agreements/inter-agency agreements that will result in the expenditure of funds to construct, alter, maintain or repair infrastructure focused on the same specific objective (e.g., construction of a mixed finance phase of construction corresponding with a single real estate closing) or limited scope of work (e.g., lead based paint abatement pursuant to a Capital Fund Lead Based Paint grant); or
- (3) In the instance of the use of Force Account Labor, both the labor and the associated acquisition of materials required to accomplish the purpose of the work being accomplished by the Force Account Labor.

The scope of an Infrastructure Project can include funding from multiple grants, funding from non-Federal sources of funding and funding from multiple agencies.

The scope of an Infrastructure Project can change during the course of implementing the project which can in turn impact the application of BABA to the Infrastructure Project. For instance, a HUD Grantee/Funding Recipient may amend a procurement to add funding thereby changing the amount dedicated to the Infrastructure Project. Such changes can result in a change to the applicability of the BAP. As an example, if a HUD Grantee/Funding Recipient initially awards a procurement for \$300,000 that is not subject to the BAP because HUD obligated the source of the funding to the PHA in Fiscal Year 2022 when BABA did not yet apply to HUD funding awarded to PHAs; but then the HUD Grantee/Funding Recipient later amends the procurement to add \$10,000 derived from a later year grant that was subject to BABA, the amended \$310,000 procurement becomes subject to BABA. Because such situations can involve complex factors that may impact the applicability of BABA, HUD recommends that Grantees/Funding Recipients considering taking an action, such as adding funding, that may impact the applicability of BABA on an Infrastructure Project send an inquiry to BuildAmericaBuyAmerica@hud.gov describing the situation so that HUD can understand the situation and provide specific advice about how to proceed.

E. Comprehensive Application to Projects and Prohibition on Intentional Splitting of Infrastructure Projects

The intent of Congress reflected in BABA makes clear the importance of application of the BAP to increase the purchase and utilization of Covered Materials that were Produced in the United States. To ensure appropriate application of the BAP, HUD Grantees/Funding Recipients are directed to evaluate Infrastructure Projects and apply waivers of BAP judiciously to them.

HUD Grantees/Funding Recipients of FFA are prohibited from intentionally splitting an Infrastructure Project to avoid application of the BAP to the project. This precludes the intentional division of procurements, subgrants, cooperative agreements, inter-agency agreements or Force Account Labor projects into separate and smaller awards or contracts to avoid BABA coverage, particularly where the procurements, subgrants, cooperative agreements, inter-agency agreements or Force Account Labor activities are integrally and proximately related to the whole.

F. Pre- and Post-Disaster or Emergency Response Expenditures Guidance

Expenditures by a Federal agency to a Non-Federal Entity for an Infrastructure Project that would otherwise be considered FFA subject to BABA requirements are not FFA and therefore not subject to BABA requirements when expended as follows:

- (1) To mitigate the impact of an impending disaster (e.g. purchasing plywood to cover windows to protect them from being damaged by an approaching hurricane); or
- (2) To respond to a disaster or an emergency (e.g. purchasing a tarp to cover a damaged roof).

If PIH is allocating funding that falls under this category of expenditures that are exempt from the BABA requirements at the time it is allocated, PIH shall communicate that the funding is exempt at the time the funding is allocated (e.g., Capital Fund Emergency/Disaster grants). If a PHA recipient of PIH funding reasonably believes that already allocated funding falls under this

exemption to BABA, it is authorized to proceed without complying with BABA requirements for a reasonable period of time until it can seek written/electronic confirmation from the PHA's Field Office director or higher level PIH official that planned expenditures fall within the scope of this exemption. A PHA recipient that seeks written/electronic confirmation from PIH that planned expenditures fall within this exemption for product purchases within one month after the end of the disaster or the onset of an emergency shall be considered to have sought confirmation within a reasonable amount of time.

G. Documentation of Compliance with BAP

PHAs must maintain adequate records to demonstrate that they complied with BABA requirements in purchasing products with funds subject to BABA. PHAs are authorized to follow different approaches calibrated to the level of complexity of the Infrastructure Projects they are implementing. At a minimum, the records must:

- (1) track product purchases in sufficient detail to identify the source of the funding for the purchase;
- (2) demonstrate compliance with BABA:
 - (i) for products purchased in compliance with the BAP, documentation that the product complied with BAP requirements; and
 - (ii) for products purchased pursuant to a waiver or other exemption from the BAP, adequate information to validate that the purchase was covered by a waiver or other exemption.

While PHAs are responsible for maintaining adequate records related to BABA compliance, many product purchases will be made by contractors procured by PHAs or other entities covered by a subgrant, cooperative agreement or inter-agency agreement. PHAs are advised to include provisions in procurement solicitations to ensure that contractors engaged by PHAs provide sufficient product purchase information to PHAs to enable them to comply with the minimum BABA documentation requirements. Likewise, in the case of subgrants, cooperative agreements or inter-agency agreements, PHAs are advised to include provisions in such agreements to ensure that other entities engaged by PHAs pursuant to such agreements provide sufficient product purchase information to PHAs to enable them to comply with the minimum BABA documentation requirements.

If PHAs are required to maintain a record of BABA compliance in product purchases, they must maintain those records in such a way as to cover all product purchases related to projects that are in the process of being completed and all projects completed until 3 years after Infrastructure Project completion at which point such records can be discarded.

For products purchased with funding from a grant or Infrastructure Project that is not subject to BABA, PHAs do not have to maintain product purchase records to comply with BABA where:

- (1) The grant is exempt from BABA requirements because expenditures for assistance authorized under section 402, 403, 404, 406, 408, or 502 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170a, 5170b, 5170c, 5172, 5174, or 5192) relating to a major disaster or emergency declared by the President under section 401 or 501, respectively, of such Act (42 U.S.C. 5170, 5191)

or pre and post disaster or emergency response expenditures; Note that in instances where HUD has provided written/electronic confirmation that expenditures fall under the pre and post disaster emergency response exception, PHAs are to maintain copies of such confirmations for 3 years after completion of the expenditures covered by the confirmation.

- (2) HUD has granted a waiver that authorizes all products purchased with the applicable grant funding to be exempt from the BAP (e.g., the grant is less than the small purchase threshold and therefore is covered by HUD's "De Minimis waiver"), but PHAs must have documentary support that the waiver applies (e.g., a copy of the grant agreement showing the size of the grant); or
- (3) Products were purchased with funding dedicated to a specific Infrastructure Project where HUD has granted a waiver that authorizes all products purchased within the boundaries of the Scope of the Infrastructure Project to be exempt from the BAP (e.g., the Infrastructure Project is smaller than the small purchase threshold), but PHAs must have documentary support that the waiver applies (e.g., a copy of the procurement contract showing the size of the procurement is less than the small purchase threshold).

A PHA can provide adequate confirmation that a product was purchased in compliance with the BAP in the following ways:

- (1) A certificate from the manufacturer or reseller that the product complies with BABA;
- (2) For products that cost less than \$100 per product, a copy of a label that indicates the product was made in the United States; or
- (3) For small purchases of product that are less than the simplified acquisition threshold (see 2 CFR 200.320(a)(2) for description of the small purchases procedures and the simplified acquisition threshold determination), either a copy of a product specification that provides sufficient detail to conclude that the product complies with BABA or a communication other than a certification from a manufacturer or reseller of a product that confirms that the product is BABA compliant.

H. Requesting Waivers of BAP

HUD Grantees/Funding Recipients may request waivers of BAP in connection with any Infrastructure Project. HUD, in its discretion, may grant waivers of BAP consistent with section 70914(b) of BABA, where the Secretary determines that:

- (1) applying the domestic content procurement preference would be inconsistent with the public interest;
- (2) 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; or
- (3) 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.

In order to grant such a waiver, HUD must publish the proposed waiver determination and provide for a period of public comment on the waiver of at least 15 days. (Note: for extensions of

existing waivers the public comment period is at least 30 days.) General Applicability waivers must be reviewed by HUD every five years from the date of issuance. In connection with such reviews, HUD must publish a notice in the Federal Register describing the justification for such waiver; requesting public comments for a period of not less than 30 days on the continued need for a general applicability waiver; and then publish a final determination, taking into account comments received from the public, on the need to continue or discontinue the waiver. Additionally, HUD must ensure that the BAP is applied consistent with any United States obligations under international agreements.

All waiver requests must be submitted in accordance with the instructions published on HUD's BABA Web Page:

https://www.hud.gov/program_offices/general_counsel/build_america_buy_america/waiver.

I. Minimum Due Diligence Search Requirements

PIH expects product purchasers to initially seek BABA compliant products through the standard methods such purchasers have used in the past. If a product purchaser is unable to find an available BABA compliant product using standard methods, further searching is required prior to seeking a waiver of the BABA requirements. Grantees and Funding Recipients, and other entities purchasing products with funds subject to BABA requirements can only seek a waiver for nonavailability pursuant to section H.(2) above after actively searching for BABA compliant products by conducting a due diligence search as outlined below:

- (1) For micro purchases as defined by 2 CFR part 200 with procedures described in 2 CFR 200.320):
 - a. Purchasers must search for the required product using one of the top five most used Internet search engines or the website of one of the top five home improvement retailers while using one of the following search terms: "made in America" or "made in the USA;"
 - b. If none of the top 10 results of the search indicate that the product is made in America, the product purchaser is not required to search further prior to submitting a waiver request;
 - c. If one or more of the search results indicates the product is made in America, the product purchaser must take the additional step of contacting the maker(s) of the product by email or by phone to confirm that the product meets the BABA requirements for the product. If the product maker either confirms that the product is not BABA compliant or that BABA compliance is uncertain, or if the product maker fails to respond to the inquiry within two business days, the product purchaser is not required to search further prior to submitting a waiver request.
- (2) For small purchases as described in procedures in regulations at 2 CFR 200.320(a)(2):
 - a. Purchasers must search for the required product using at least two search attempts either using one of the top five most used Internet search engines or the website of one of the top five home improvement retailers while using one of the following search terms: "made in America" or "made in the USA;"

- b. If none of the top 20 results of both searches indicate that the product is made in America, the product purchaser is not required to search further;
 - c. If one or more of the search results indicates the product is made in America, the product purchaser is to contact the maker(s) of the product by email or by phone to confirm that the product meets the BABA requirements for the product. If the product makers either confirm that the maker's product is not BABA compliant or that BABA compliance is uncertain, or if the product maker fails to respond to the inquiry within two business days, the product purchaser is not required to search further.
- (3) For purchases that meet or exceed the simplified acquisition threshold amount as defined 2 CFR 200.1:
- a. The Purchaser must search for the required product using at least three search attempts either using one of the top five most used Internet search engines or the website of one of the top five home improvement retailers while using one of the following search terms: "made in America" or "made in the USA;"
 - b. If none of the top 30 results of both searches indicate that the product is made in America, the product purchaser is not required to search further;
 - c. If one or more of the search results indicates the product is made in America, the product purchaser is to contact as many makers as the search results indicate are made in America, up to a maximum of five products, by email or by phone to confirm that the product meets the BABA requirements for the product. If the contacted product makers either confirm that the maker's product is not BABA compliant or that BABA compliance is uncertain, or if the product maker fails to respond to the inquiry within five business days, the product purchaser is not required to search further.
- (4) Grantees seeking a waiver pursuant to Section H.(2) above shall be required to document compliance with the minimum search requirements enumerated in this Section including:
- a. Copies of searches used (e.g. PDF/JPEG copies of web pages showing search terms and results);
 - b. Copies of email correspondence with product makers;
 - c. Records of phone contacts with product makers, including:
 - i. Dates and times of phone communications;
 - ii. phone numbers used;
 - iii. Whether the phone communication was successful in making it possible to reach a staff person for the product maker able to respond to questions about BABA compliance, or whether the attempt at communication was unsuccessful (e.g., left a message, phone line was busy, or phone line was disconnected);

- iv. If the phone communication resulted in reaching someone, the name of the person contacted; and
- v. Notes describing the substance of the conversation (e.g., manufactured product is assembled in U.S., but the manufacturer is uncertain whether 55% of the value of the materials/components are sourced in the U.S.).

J. Safe Harbor Procurement Strategies

As noted above, HUD Grantees/Funding Recipients must ensure that all contracts they enter into incorporate requirements to ensure application of the BAP, unless the BAP has been waived for funds utilized in connection with an Infrastructure Project. Grantees/Funding Recipients may consider utilizing one of the following strategies:

- (1) Designate BABA compliant products prior to procurement:
 - a. A HUD Grantee/Funding Recipient is permitted to research the availability of a BABA compliant product (including both quantity available and quality available), and subsequently to designate in a procurement that contractors bidding on the procurement must use the designated BABA compliant product in accomplishing the work specified in the procurement;
 - b. A HUD Grantee/Funding Recipient that designates a BABA compliant product, is not unduly restricting competition as delineated in 2 CFR 200.319(b)(6); and
 - c. A HUD Grantee/Funding Recipient that uses an Architectural/Engineering provider including one procured pursuant to 2 CFR 200.320(b)((2) to draft specifications that will be included in procurements of contractors performing work at an Infrastructure Project can utilize the services of the Architectural/Engineering provider to conduct the BABA availability research outlined in paragraph 1.a. above, and rely upon that research to make the designation in paragraph 1.a. above.
- (2) Require bidders to submit both BABA compliant and non-BABA compliant proposals:
 - a. A HUD Grantee/Funding Recipient can shift the burden of doing the research to determine if a needed BABA compliant product or products is/are available in the required quantity and at the required quantity to contractors responding to solicitations;
 - b. In this instance, a HUD Grantee/Funding Recipient can require contractors responding to solicitations to provide alternative responses depending on whether the contractor responding to the solicitation is successfully able to find the necessary BABA compliant products:
 - i. Contractors that are successful in finding needed BABA compliant products would respond to the solicitation with two responses: one that is BABA compliant and one that is

- not which could potentially be used as the basis for a waiver based on increased project cost;
- ii. Contractors that are not successful (or only partially successful) would respond by submitting a complete response that is not BABA compliant as well as a response that indicates that the contractor was unable to find the necessary BABA compliant products, and would submit documentation compliant with the minimum requirements of Section H above in lieu of a BABA compliant response to the solicitation;
 - iii. If all of the responsible contractors responding to the solicitation submit documentation in lieu of a BABA compliant response, the documentation can form the basis for a BABA waiver based on nonavailability.

All waiver requests must be submitted in accordance with the instructions published on HUD's BABA Web Page at https://www.hud.gov/program_offices/general_counsel/BABA.

6. REQUEST FOR COMMENT

In crafting this notice, PIH endeavored to balance the intent of the law to stimulate American production of iron, steel, construction materials and manufactured products with the need to put in place processes and procedures that recognize practical challenges PIH grantees will face in carrying out vital grant activities for low-income housing under the 1937 Act. PIH expects BABA requirements to substantially impact grantee operations potentially in unexpected ways, and therefore, PIH seeks comment from PHAs, assisted housing providers, grantees, and other interested members of the public on this notice generally even though the notice will be in effect upon publication. Comments received in response to this solicitation will aid HUD in developing additional implementation actions and guidance. Comments are to be submitted via email to BuildAmericaBuyAmerica@hud.gov using the following subject line: "Comment on PIH BABA Notice."



Richard J. Monocchio
Principal Deputy Assistant Secretary
Office of Public and Indian Housing