



# Build America, Buy America Act


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TRIBAL CONSULTATION

NCAI MID-YEAR – JUNE 7, 2023

# Overview & Purpose

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- Provide background on BABA.
  - Explain Current BABA Waiver for HUD Tribal Recipients.
  - Consult on Impacts of BABA.
  - Gather comments and feedback on impact of BABA.
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# Office of Native American Programs

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- Jad Atallah, Director, Office of Performance and Planning
- Gary Nemec, Director, Office of Grants Evaluation
- Hilary Atkin, Director, Office of Grants Management
- Rebecca Halloran, Team Lead, Office of Grants Management
- Michelle Tinnin, Native American Program Specialist
- Danielle Schopp, Environmental Clearance Officer

## *What is BABA?*

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The [Infrastructure Investment and Jobs Act \(IIJA\)](#), signed on November 15, 2021, included the Build America, Buy America Act (BABA) which is a law applying to ***all*** Federal agencies and ***all*** sources of Federal funds.

See the [OMB M-22-11](#) and [OMB BABA Fact Sheet and FAQ](#) for Award Recipients.


# *What does it mean?*

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**Section 70914** of BABA requires that:

Products purchased in connection with **infrastructure projects** funded with **Federal financial assistance** programs must be produced in the United States.

BABA applies to any of these products for infrastructure projects:

- ***Iron or steel*** products
  - ***Manufactured*** products
  - ***Construction*** materials.
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# *What do these requirements apply to?*

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BABA requirements apply to **all** awards by a Federal agency to a **non-Federal entity** (Tribes, TDHEs, public housing authorities, states, cities, counties) through Federal Financial Assistance programs.

Federal Financial Assistance programs include:

- Federal Grants
- Cooperative agreements
- Direct appropriations
- Loan guarantees
- Other financial assistance.

**Note:** BABA is **not** limited only to IJA funding and includes annual appropriation acts.

## *What ONAP Grants do these requirements apply to?*

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BABA likely applies to infrastructure projects funded under the following Grants:

- IHBG Formula
- IHBG COMP
- ICDBG

## *What ONAP Grants are excluded from these requirements?*

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BABA Sec. 70192(4)(B) *excludes* “pre and post disaster or emergency response expenditures”.

- IHBG-CARES
- ICDBG-CARES
- IHBG-ARP
- ICDBG-ARP
- ICDBG-Imminent Threat



# *What Infrastructure is covered?*

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Infrastructure Projects include the Construction, Alteration, Maintenance, or Repair of:

- Buildings and real property
- Utilities
- Water systems (both drinking water and wastewater)
- Electrical transmission facilities and systems
- Broadband infrastructure
- Transportation related-infrastructure (roads, highways, bridges), and more

Infrastructure to be construed "broadly".



## *What materials are covered?*


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- Iron or steel products
- Manufactured products
- Construction materials

**Note:** Sec. 70917(c) excludes aggregates (cement, stone, sand, gravel) from the definition of construction materials.

# *What Iron or Steel is Considered Produced in U.S.?*

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- OMB Proposes to define as follows: Iron or Steel that "consist wholly or predominantly of iron, or steel, or both"
  - All manufacturing processes, from initial melting stage through application of coating, must occur in the U.S.
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## *What Construction Materials are covered?*

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- Non-ferrous metals (e.g. lead, stainless steel, tin, brass, aluminum)
- Plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables)
- Glass (including optic glass)
- Fiber optic cable
- Optical fiber
- Lumber
- Drywall
- Under OMB proposed rule, also includes coating (paint), brick, engineered wood

# *What Construction Materials are considered Produced in U.S.?*

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- ALL manufacturing processes for the construction materials must have occurred in the U.S.
- Some examples:
  - Lumber. All manufacturing processes, from initial debarking through treatment and planing, 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, occurred in the United States.

## *What Manufactured Products are considered Produced in U.S.?*

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- Manufactured products are materials, articles or supplies incorporated in an infrastructure project that are not iron/steel and not one of the listed construction materials.
- OMB is proposing that the manufactured product must have been manufactured in the United States; and
- 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

## *Can we apply for waivers?*

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- **Section 70914** of BABA establishes the scope, criteria, and process for issuing waivers.
- Executive Order 14005 and OMB management memorandum M-21-26 require that OMB's Made in America Office review all proposed waivers.

All proposed waivers must appear in the Federal Register and allow for 15 days of public comment.



## *What Types of Waivers are Available?*

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- General applicability (broad scope), or
  - Project specific
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# *What is the basis for the waiver?*

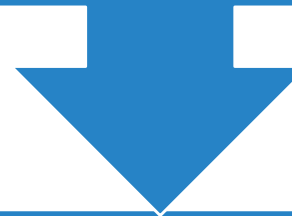
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- Public interest
- Non-availability of materials, or
  - (not available in the quantity)
  - (not available at the quality)
- Results in an increase in the cost of the “project” by more than 25 percent.

All proposed waivers must appear in the Federal Register and allow for 15 days of public comment.

## BABA Actions to Date

12/20/21 – OMB Memorandum [M-22-08](#) Notifying Federal Agencies of Reports due to OMB by 1/14/22.



1/19/22 – [HUD Notice](#): Identification of Federal Financial Assistance Infrastructure Programs Subject to the Build America, Buy America Provisions of the Infrastructure Investment and Jobs Act

Family Self Sufficiency (probably not)	Resident Self Sufficiency Service Coordinators (probably not)	Juvenile Re-entry Assistance Program (probably not)	Choice Neighborhood Planning (probably not)	<b>Choice Neighborhoods Implementation</b>	<b>Public Housing Capital Fund</b>	<b>Indian Housing Block Grants</b>	<b>Community Development Block Grant &amp; Indian Tribes and Alaska Native Villages</b>
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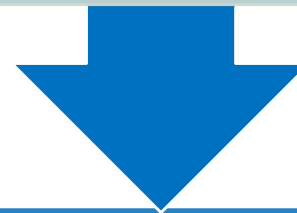
## *BABA Actions to Date*

11/23/22 - HUD publishes De Minimus Waiver - this waiver is important:

Exempts grants that are equal to/under \$250,000

Exempts most public housing contracts equal to/under \$250,000

Exempts 5% of procurements above \$250,000 as long as the 5% does not exceed \$1 million



11/23/22 – HUD publishes Exigent Circumstances waiver – exempts certain activities from BABA:

Curing exigent health/safety issues

Likely Capital Fund Emergency/Disaster grant funding

# BABA Actions to Date

2/19/23 – OMB publishes a proposed rule implementing BABA: 2 CFR 184

OMB got thousands of comments

OMB is working with Agencies to go through comments

Lots of significant issues being considered



3/15/23 - HUD publishes Phased Implementation Waiver - this waiver is important:

Choice Neighborhood Implementation grants scheduled to be awarded late spring/early summer of 2023 – BABA applies to purchase of iron/steel products

For funds obligated on or after February 22, 2024 – BABA applies to purchase of iron/steel products for the public housing program (excluding maintenance)

For funds obligated on or after August 23, 2024 – BABA applies across the board to all public housing programs for iron/steel, manufactured products and construction materials



5/23/2023 – HUD Waiver to delay applicability of BABA to Tribes/TDHEs effective until **May 23, 2024**

# *What does the current Tribal waiver do?*

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- Provides HUD with an additional year, until May 23, 2024, to Consult with Tribes on the applicability of BABA and the impact it will have on projects.  
*Your input is extremely important as we move forward.*
- Until May 23, 2024, ONAP grants funded with Indian Housing Block Grant and the Indian Community Development Block Grant are exempted from the requirements of BABA.
- This waiver only applies to HUD funding sources. If your project combines funds with other federal sources, you will need to determine if BABA is in effect for that agency's funds.

# *Questions for Consideration*

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- What are the expected impacts of BABA on construction and infrastructure development?
- Do you know whether the iron, steel, construction materials, and manufactured goods you currently buy are made in the US?
- Do you have access to viable American suppliers of iron, steel, construction materials, and manufactured goods?

## *Questions for Consideration*

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- Do you anticipate that BABA will increase the cost of construction of infrastructure projects?
- Should HUD consider a different de minimis threshold requirement when BABA applies to Tribal infrastructure projects?
- When should HUD begin to require Tribes and TDHEs to comply with BABA requirements?
- Are there other comments you'd like to share, or other issues HUD should consider?

# *Thank you for your input*

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Please ensure that your Project Managers, Contractors, and Housing Staff are aware of BABA and provide input on how BABA will impact future projects, costs, and timelines

## **Next Session:**

July 11, 2023 @ Southern Plains Indian Housing Association, Durant, OK

**Submit comments to: [Consultation@hud.gov](mailto:Consultation@hud.gov)**