



OFFICE OF PUBLIC AND INDIAN HOUSING
OFFICE OF HOUSING

SPECIAL ATTENTION OF:

Administrators, Offices
of Native American Programs;
Tribes; Tribally Designated
Housing Entities; Department of
Hawaiian Homelands

NOTICE PIH 2024-35

Issued: October 11, 2024

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superseded, or rescinded.

Cross References: Sections
70901-52 of Pub. L. No. 117-
58; 2 CFR Part 184.

SUBJECT: Build America, Buy America Act (BABA) – Implementation Guidance for Tribal Recipients

1. Purpose

This Notice provides guidance to Tribes, Tribally Designated Housing Entities (TDHEs), Tribal entities, and the Department of Hawaiian Home Lands (DHHL) (collectively called “Tribal Recipients” in this Notice) on how to implement the “Buy America Preference” (BAP) imposed by the Build America, Buy America Act (BABA). **It is intended to outline BABA requirements for all U.S. Department of Housing and Urban Development (HUD) Tribal Recipients when applying the BAP to covered programs and projects.** It also clarifies which Office of Native American Programs (ONAP) grants are subject to BABA, how to determine if the BAP is applicable to a project, which HUD general waivers may apply to a project, how to document BAP compliance, and how to submit a specific waiver request for approval.

BABA established BAP requirements for certain infrastructure projects funded with Federal awards, and HUD issued a waiver of these requirements for Tribal Recipients that expired after September 30, 2024.

This Notice is effective upon publication and applies to any Federal Financial Assistance (FFA) obligated by HUD to Tribal Recipients on or after October 1, 2024.

2. Background

A. The Build America, Buy America Act (BABA) and OMB Guidance

BABA was enacted on November 15, 2021, as part of the Infrastructure Investment and Jobs Act (IIJA), [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. This preference requires that the iron, steel, construction materials and manufactured products purchased using FFA for covered projects be manufactured in the United States. *See Appendix A: Definitions Applicable to this Notice* for key BABA terms.

On April 18, 2022, the U.S. Office of Management and Budget (OMB) issued guidance on the implementation of the BAP via Memorandum [M-22-11](#), “Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure.”

Pursuant to Section 70914 of BABA, beginning May 14, 2022, HUD is required to ensure that the BAP is applied to any new FFA awards obligated for infrastructure projects, unless waived.

Under Section 70914(b), HUD has authority to waive 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.

Any waivers must be published by HUD with a detailed written explanation for the proposed determination and provide a public comment period of not less than 15 days. See section 2.B below for information on the public interest general applicability waivers issued by HUD to date.

On August 23, 2023, OMB issued a final rule ([88 FR 57750](#)) for 2 CFR Parts 184 and 200, and provided further guidance on implementing the statutory requirements and improving FFA management and transparency. The guidance provided directions on the BAP waiver processes, and supplementary information on construction material standards, the cost components of manufactured products, and their definitions. These government-wide regulations apply to HUD programs

On October 25, 2023, OMB published additional guidance via Memorandum [M-24-02](#), “Implementation Guidance on Application of Buy America Preference to Federal Financial Assistance Programs for Infrastructure,” superseding its earlier M-22-11 Memorandum.

On April 22, 2024, OMB published revisions ([89 FR 30046](#)) to [2 CFR Part 184](#), which included regulatory guidance on the implementation of BABA and revisions to [2 CFR Part 200](#).

OMB advises that the term “infrastructure” encompasses, among other things, the structures, facilities, and equipment for “buildings and real property.” **HUD will be issuing additional guidance on this and provide training and updates as we receive additional guidance.**

Consistent with this guidance, OMB’s [M-24-02](#) Memorandum and revised [2 CFR Part 184](#): Buy American Preferences for Infrastructure Projects, this Notice provides guidance to Tribal Recipients in determining whether the BAP is applicable to a HUD funded project.

B. HUD’s BABA Implementation Waivers

HUD has published general applicability waivers for various agency programs. 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, HUD issued waivers that apply to Tribal Recipients of programs administered by HUD. HUD may grant additional waivers of BAP requirements or extend the duration of existing waivers. HUD will publish such waivers by Notice and will seek public comment on such waivers. Further details on these waivers are provided in the table below.

HUD Public Interest Waivers

Waiver Type	Purpose	Effective Dates
Tribal Recipients Waivers	HUD issued multiple waivers that delayed the implementation of the BAP for Tribal Recipients. The most current, as of the date of this Notice, is the public interest waiver entitled, <i>“Extension of Public Interest, General Applicability Tribal Consultation Waiver of Build America, Buy America Provisions as Applied to Tribal Recipients of HUD Federal Financial Assistance”</i> .	The public interest waiver of BAP requirements for Tribal Recipients is effective until September 30, 2024.
Exigent Circumstances	HUD issued <i>“Public Interest Waiver of Build America, Buy America Provisions for Exigent Circumstances as Applied to Certain Recipients of HUD Federal Financial Assistance”</i> . This waiver applies to ICDBG-Imminent Threat grants not already exempt from the BAP due to a disaster or emergency declaration, and other actions taken by Tribal Recipients under HUD programs that meet the exigent circumstances criteria outlined in the waiver. See details in Section 8.F(i) of this Notice.	The public interest waiver for exigent circumstances is effective from November 23, 2022, for a period of five years (November 23, 2027), or such shorter time as HUD may announce via Notice.

Waiver Type	Purpose	Effective Dates
<p>De Minimis¹, Small Grants, and Minor Components</p>	<p>HUD issued “<i>Public Interest De Minimis and Small Grants Waiver of Build America, Buy America Provisions as Applied to Certain Recipients of HUD Federal Financial Assistance</i>”. This waives the BAP for all infrastructure projects whose total cost, from all funding sources, is equal to or less than the simplified acquisition threshold at 2 CFR 200.1, which is currently \$250,000. It also waives application of the BAP for all Small Grants provided by HUD that are equal to or below the simplified acquisition threshold. Additionally, it waives application of the BAP for a <i>de minimis</i> portion of an infrastructure project, meaning a cumulative total of no more than five 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. See details in Section 8.F(ii-iii) of this Notice.</p>	<p>The public interest <i>de minimis</i>, small grants, and minor components waiver is effective from November 23, 2022, for a period of five years (November 23, 2027), or such shorter time as HUD may announce via Notice.</p>

Only general waivers that apply to Tribal Recipients are included above. Additional details on HUD’s implementation of the BABA requirements, including all proposed and existing waivers, can be found at: www.hud.gov/baba.

3. Definitions

Terms applicable to this Notice are defined in *Appendix A*.

4. Incorporation of BAP Requirements into HUD Awards

HUD will include BAP requirements in Notices of Funding Opportunities (NOFOs) indicating that they will apply to grants awarded under those NOFOs. ONAP will include BAP terms and conditions in the grant agreements obligated by HUD on or after October 1, 2024, for FFA subject to the BAP (both announced by NOFO and through an allocation formula) specifying that the grant recipient must comply with BAP requirements, unless waived.

¹ See also Section 8.E. for the *de minimis* exemption under 203(g) of the Native American Housing Assistance and Self-Determination Act, 25 USC 4133(g).

5. BAP Applicability to HUD Grant Program Funding

HUD will require Tribal Recipients to document compliance with BAP requirements when carrying out Infrastructure Projects and ensure that the subrecipients, contractors, and subcontractors paid with FFA subject to BABA also comply with BAP requirements.

The following ONAP program FFA obligated on or after October 1, 2024, **may be subject to BAP requirements**:

- Indian Housing Block Grant (IHBG) Formula,
- IHBG-Competitive (IHBG-COMP),
- Indian Community Development Block Grant (ICDBG) Single Purpose,
- Native Hawaiian Housing Block Grant (NHHBG),
- Title VI Loan Guarantees under the Native American Housing Assistance and Self-Determination Act of 1996 (Title VI).

These programs are considered “covered programs.” Tribal Recipients of other HUD or federal funds must verify whether each FFA is a covered program per NOFO, announcement, or grant agreement.

Per [2 CFR 184.8](#), the BAP does not apply to FFA used for “pre and post disaster or emergency response.” Therefore, the **BAP does not apply** to the following ONAP programs:

- IHBG-Coronavirus Aid Relief and Economic Security Act (CARES),
- IHBG-American Rescue Plan Act (ARP),
- ICDBG-CARES,
- ICDBG-ARP,
- ICDBG-Imminent Threat (IT), in cases involving Presidentially declared disasters or emergencies².
- NHHBG-ARP.

In addition, the BAP **does not apply** to FFA obligated for programs that do not fund public Infrastructure Projects. This includes the following:

- Tribal HUD-Veteran Affairs Supportive Housing (Tribal HUD-VASH) program is not subject to the BAP since funding under that program is specifically for rental assistance and associated administrative fees and would not be considered a public infrastructure project.
- Section 184 Indian Housing Loan Guarantee program.

6. BAP Applicability to General Tribal Housing and Community Development

² ICDBG-IT awards made to address imminent threats or emergencies that do not have an accompanying declared disaster or emergency declaration are still exempt from the BAP under the Exigent Circumstances waiver addressed above.

Tribal Recipients are responsible for assessing each project funded with FFA subject to BABA to determine if the BAP applies to the project and, if so, documenting compliance with BAP requirements.

BAP requirements on FFA apply to the procurement of *covered materials* utilized in Infrastructure Projects. Specifically, the **iron and steel, manufactured products, and construction materials** must be sourced from producers and workers in the U.S. See **Appendix A** for more detailed definitions.

As mentioned above, it is important to clarify that covered FFA can be used for projects that would not be subject to the BAP because they do not involve spending on the construction, alteration, maintenance, or repair of public infrastructure, as specifically defined in the law and as further described below.

Below is a set of examples of housing activities that are covered by BABA but exempt from the BAP requirements.

Examples of HUD-funded eligible activities **not typically subject to the BAP**³:

- Acquisition of real property,
- Relocation and demolition,
- Public services,
- Shelter or public facility operating expenses,
- Supportive services,
- Short-term payments to prevent homelessness,
- Administrative activities supporting disaster and emergency response,
- Rental assistance,
- Downpayment and mortgage assistance.

Examples of HUD-funded eligible activities that **MAY be subject to the BAP**:

- Construction of public facilities and improvements, such as water and sewer facilities, streets, sidewalks, neighborhood centers, and the conversion of buildings for public use,
- Utility installation or improvements, if serving public use,
- Water systems (drinking water and wastewater), if serving public use,
- Electrical transmission facilities and systems, if serving public use,
- Special economic development activities, if serving public use,
- Broadband infrastructure, if serving public use,
- Transportation infrastructure, if serving public use.

See **Section 9** of this Notice for examples of Tribal Housing and Community Development project BAP applicability determinations.

³ HUD will be issuing additional guidance in the near future related to how BABA applies to housing projects. HUD will provide training and updates as we receive additional guidance.

7. Implementation of BAP Requirements by Tribal Recipients

In accordance with [2 CFR § 184.4\(b\)](#), BAP terms and conditions of a Federal award flow down to subawards and subrecipients unless a particular section of the terms and conditions of the Federal award specifically indicate otherwise. Tribal Recipients must ensure that all procurements, subrecipient agreements, or cooperative agreements that involve covered FFA obligated by HUD on or after October 1, 2024, incorporate terms and conditions requiring contractors, subrecipients, or other expending parties to comply with BABA and application of the BAP.

Tribal Recipients are also responsible for ensuring all subawards, contracts, and purchase orders for the work performed, or products supplied for a project subject to the BAP, include terms requiring BAP compliance and that the requirements are complied with. BAP compliance terms and conditions must be communicated to subrecipients, contractors, subcontractors and other entities prior to their purchasing Covered Materials with FFA subject to the BAP. The terms and conditions must specify the FFA expender's record-keeping requirements. Such record-keeping must be consistent with existing records retention requirements for the relevant HUD program or Tribal policy, whichever is longer.

See **Appendix B: BAP Terms and Conditions for Tribal Contracts** for sample language that can be used in contracts, subrecipient agreements, and other agreements.

8. Determining BAP Applicability to a Project

When determining if the BAP applies to a project, consider the criteria listed below in succession. Each subsequent question will help determine whether the project is exempt or how it is subject to BAP requirements. See **Appendix C: ONAP BAP Applicability Determination Checklist**, an optional tool designed to assist in making BAP applicability determinations on projects.

A. Determine if the project is an Infrastructure Project

Consistent with [2 CFR Part 184](#) and [OMB Guidance M-24-02](#), the BAP only applies to covered materials used for public infrastructure projects purchased with FFA subject to BABA.

[2 CFR § 184.4\(c\)](#) explains that “infrastructure” encompasses public infrastructure projects in the United States. The term 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.

[2 CFR § 184.4\(d\)](#) recommends considering 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.

For purposes of this Notice, the scope of a public Infrastructure Project (including buildings and real property) is either:

- A procurement, subrecipient agreement, cooperative agreement or inter-agency agreement that will result in the expenditure of funds to construct, alter, maintain, or repair public infrastructure (*e.g.*, purchasing lumber to construct a public facility); or
- A collection of procurements/subrecipient agreements/cooperative agreements/inter-agency agreements that will result in the expenditure of funds to construct, alter, maintain, or repair public infrastructure focused on the same specific objective (*e.g.*, procuring multiple contracts to construct road access or a public facility).

If a project includes public infrastructure, it is subject to the BAP. For example, FFA may be used on Tribal reservations and other Tribal land to construct, alter, maintain, or repair infrastructure, including buildings available for general use (*e.g.*, health/nutrition clinics, daycare centers, libraries, visitor centers, cultural centers, routinely used public roads and utilities).

Tribal Recipients are encouraged to define the scope of a project early on by assessing the specific objective that they are trying to achieve through the project. Tribal Recipients should use their best judgment when assessing the specific objective of a project and determining the scope of the project. HUD will be informed by the information provided by the Tribal Recipient when assessing the scope of a project.

B. Determine if Covered Materials will be used in the Infrastructure Project

To determine how the BAP would apply to the Public Infrastructure project, assess the types of products and materials that will be purchased for the project. Covered Materials subject to the BAP include the following when used in connection with a public infrastructure project:

- All Iron and Steel,
- All Manufactured Products,
- All Construction Materials.

See **Appendix A** for definitions of the covered products per [2 CFR 184](#).

C. Determine whether the FFA used to purchase the Covered Materials for a Public Infrastructure project is from a program subject to the BAP

If the project qualifies as a Public Infrastructure project, assess whether the project’s funding is subject to the BAP. See **Section 5 above** for a list of HUD ONAP grants subject to the BAP and those not subject to the BAP. Note that if other HUD or federal funds are leveraged with ONAP funds, each federal source of funding must be verified as BAP applicable or not. Refer to the grant NOFO or BABA guidance for the funding agency.

D. Determine if the FFA from a covered program was obligated on or after October 1, 2024

For ONAP grants, the Grant Obligation Date is the date the grant agreement for the award is signed by the Area ONAP Administrator.

Due to the Tribal Waiver noted above in **Section 2.B.** of this Notice, grants to HUD Tribal Recipients obligated on or before September 30, 2024, are not subject to the BAP. FFA from HUD covered grants obligated on or after October 1, 2024, used for covered materials on a public infrastructure project, *are subject to the BAP requirements.*

E. Determine if the procurement of Covered Material falls within the *De Minimis* exemption under the Native American Housing Assistance and Self-Determination Act (NAHASDA)

Pursuant to Section 203(g) of NAHASDA (25 USC 4133(g)), notwithstanding any other provision of law, an IHBG recipient shall not be required to act in accordance with any otherwise applicable competitive procurement rule or procedure with respect to the procurement, using an IHBG grant, of goods and services the value of which is less than \$5,000. Accordingly, any procurement using IHBG funds under \$5,000 will be exempt from the BAP regardless of whether the Public Infrastructure Project is subject to BABA.

F. Determine if any of the HUD General Waivers apply to the Public Infrastructure project

HUD established public interest waivers for Exigent Circumstances, De Minimis and Small Purchase. These waivers are effective through **November 23, 2027**, or such shorter time as HUD may announce via Notice.

i. [Exigent Circumstances Waiver](#)

HUD’s exigent circumstances waiver states that “funds obligated by HUD during the time period this waiver is effective will not be required to apply the BAP when funds are expended by the grantee or funding recipient in connection with exigent circumstances as described in this waiver.” Per the waiver, exigent circumstances include “circumstances where undertaking BAP-covered infrastructure project without delay is necessary to protect life, safety or provide necessary security to residents or community members, or to prevent the

destruction of property.” This waiver of the BAP will apply provided such remediation is carried out within the time period required by HUD policy.

If your public infrastructure project is carried out under exigent circumstances, it may be exempted from the BAP by this waiver. Some examples may include purchasing plywood to cover windows to protect them from being damaged by an approaching storm, quickly replacing a boiler malfunction in the middle of the winter in a facility, repairing a power line to restore electricity to a community impacted by a severe weather event, or quickly repairing a fire exit door that is damaged and becomes unusable in a public facility.

Maintain supporting documentation of your determination for compliance.

ii. [Small Grants & Purchase Waiver](#)

HUD has waived the application of the BAP for infrastructure projects whose total cost (including FFA from HUD and any other federal source) is an amount equal to or less than the Simplified acquisition threshold, which is currently \$250,000. HUD has 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, which is currently \$250,000. If the total cost of your public infrastructure project is \$250,000 or less, it may be exempt from the BAP using this waiver.

However, if FFA provided by HUD is combined with other FFA from another Federal agency, and the total amount of FFA in a single project is greater than the Simplified acquisition threshold, currently \$250,000, then the waiver will not apply to the FFA provided by HUD.

If the Infrastructure Project includes the use of Force Account Labor, the cost of labor is excluded from the associated acquisition of Covered Materials required to accomplish work, and therefore would not be included as part of the above calculations.⁴

Note: HUD will not permit the artificial subdivision of infrastructure projects to fit within the scope of this waiver of the BAP. Intentionally splitting one procurement into multiple procurements to reduce the total Infrastructure project costs below \$250,000 to avoid application of the BAP to the project is prohibited. This includes the intentional division of procurements, subrecipient agreements, or cooperative agreements, into separate and smaller awards or procurements to avoid BABA coverage, particularly where the procurements, subrecipient agreements, or cooperative agreements, are integrally and proximately related to the whole.

⁴ For more information on the applicability of BABA to Force Account labor, see HUD’s BABA FAQs available at: [Frequently Asked Questions \(FAQs\) | HUD.gov / U.S. Department of Housing and Urban Development \(HUD\)](#)

HUD will evaluate the total cost of the infrastructure project as “the activity, or a group of integrally related activities, designed by the recipient to accomplish, in whole or in part, a specific objective.” Tribal Recipients are encouraged to define the scope of a project early on by assessing the specific objective that they are trying to achieve through the project. HUD will be informed by the information provided by the Tribal Recipient when assessing the scope of a project. Tribal Recipients should use their best judgment when assessing the specific objective of a project and determining the scope of the project. *Detailed procurement records should be kept in support of the use of the Small Purchase waiver.*

iii. [De Minimis Waiver:](#)

HUD has waived 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.

For example, if the cost of the steel, manufactured products, and construction materials in your project totals \$1,300,000, you could procure a portion of those materials, up to \$65,000 (5%) without applying BAP requirements to the procurement. *Detailed procurement records should be kept in support the use of the De Minimis waiver.*

Maintain supporting documentation of your determination in your procurement records.

9. Examples of Tribal Project BAP Applicability Determinations

Additional guidance related to the construction, alteration, maintenance, or repair of buildings and real property, as it relates to housing, will be addressed in supplemental guidance. The following examples illustrate potential scenarios Tribal Recipients may encounter in determining whether an activity or project is subject to the BAP:

A. Tribal Facilities

The Tribal Recipient intends to use FFA to build a community center and playground. The community center and playground are intended to be used primarily by Tribal members and other Tribal members for gatherings and cultural events. The contract for the construction of the community center and playground, including Covered Materials, exceeds \$250,000.

The community center and playground are considered a public Infrastructure Project and *is subject to the BAP.*

B. Tribal Infrastructure

Using FFA from HUD, the Tribal Recipient intends to build a large multi-purpose building on its reservation in which it intends to house a health and nutrition clinic, a daycare center, and a library that are intended to be used primarily by Tribal members and members of other Tribes residing on the reservation. The project includes the multi-purpose building, a four-mile access road connecting the State highway and the facility's parking lot, and utility lines (electric, water and sewage) connected to the main lines running along the highway. The contract for the construction of the multi-purpose building including Covered Materials exceeds \$250,000.

This is a Public Infrastructure Project because it includes expenditures to construct, alter, maintain, or repair infrastructure. *Therefore, this project would be subject to the BAP.*

C. Public Infrastructure/Public Works Open to the General Public

Using FFA from HUD, the Tribal Recipient intends to build a Welcome and Cultural Center on its Tribal lands, which it plans to use to attract visitors and foster tourism on the reservation. The project includes the Cultural Center, a four-mile access road connecting the State highway and the Center's parking lot, and utility lines (electric, water and sewage) connected to the main lines running along the highway. The project is an infrastructure project because it includes expenditures to construct, alter, maintain, or repair infrastructure. Therefore, the Welcome and Cultural Center falls under the BABA definition of a public infrastructure project and *is subject to the BAP.*

10. Documentation of Compliance with the BAP

Tribal Recipients are responsible for maintaining adequate records documenting BAP compliance for Covered Materials purchases. The compliance documentation must support the following:

- The project for which the covered materials are being procured is a Public Infrastructure project subject to BABA.
- All iron and steel used in the project are produced in the United States. This means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.
- All manufactured products used in the project are produced in the United States. This means the manufactured product was 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, 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.

- All construction materials used in the project are manufactured in the United States. This means that all manufacturing processes for the construction material occurred in the United States.

At a minimum, the procurement records must include documentation of determining BAP applicability to the project. Even if the project is determined to be exempt, documentation of that determination should be retained in the procurement record to support the determination. See the optional BAP Applicability Determination Checklist in **Appendix C**.

If the project is subject to the BAP requirements, the following are examples of information and documentation that the Tribal Recipient can retain to demonstrate compliance. This is not an exhaustive or mandatory list and simply provides some examples of ways that documentation can be maintained:

A. Project Budget specifying the total project cost and the cost of covered materials.

B. Procurement List for covered materials to be purchased, either by the Tribal Recipient, sub-recipient, or contractor. This list should reflect:

- Type of covered material, (iron, steel, manufactured product, or construction material);
- Product or Material;
- FFA Source(s);
- FFA Obligation Date(s);
- Costs per unit;
- Total cost of product purchase or contract;
- Manufacturer or Vendor;
- Actual purchaser (Tribe, sub-recipient, contractor);
- Special Quality Standards, if applicable; and
- U.S. Made verification, if available (Made in America label, product specifications, vendor or contractor certification, etc.).

C. Results of market research and product sourcing to include, but not limited to, the following:

- Copies of web searches used (*e.g.*, PDF/JPEG copies of web pages showing search terms and results including sources considered, eliminated, and chosen for further research);
- Copies of email correspondence with covered materials manufacturers or suppliers; and
- Records of phone communications with covered materials manufacturers or suppliers, including:
 - Dates and times of phone calls,
 - Phone numbers used,
 - Whether the phone communication was successful in making it possible to reach a staff person manufacturer or supplier 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),

- If the phone communication resulted in reaching someone, the name of the person contacted,
- 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 United States).

D. Documentation supporting the covered materials were made in the United States

For example:

- A copy of the Made in America or another label that indicates the product was made in the United States;
- A copy of the product specifications that provides sufficient detail to conclude that the Covered Materials comply with BABA;
- A certificate or other documentation from the manufacturer or reseller demonstrating that the Covered Materials comply with BABA;
- A signed certification from the contractor of a project certifying “to the best of his/her knowledge and belief, all Iron, Steel, Manufactured Products, and Construction Materials installed on the project by the contractor and by any and all subcontractors and suppliers for the project comply with the Build America, Buy America Act (BABA) 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 Housing and Urban Development or designee”; and
- A signed certification from the manufacturer of the Covered Materials certifying “to the best of his/her knowledge and belief the Covered Materials comply with the Build America, Buy America Act (BABA) 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 Housing and Urban Development or designee.”

11. Responsibility for ensuring BABA Compliance of Contractors and Sub-recipients

If covered materials are purchased by contractors or other entities party to a subrecipient agreement, cooperative agreement or inter-agency agreement, the Tribal Recipient of the FFA used is still responsible for maintaining documentation of BABA compliance.

Tribal Recipients are advised to include the terms and conditions described above in **Section B.7** and **Appendix B** in procurement solicitations to ensure that contractors engaged by Tribal Recipients are required to comply with the BAP and provide sufficient purchase information demonstrating compliance to Tribal Recipients.

Likewise, in the case of subrecipient agreements, cooperative agreements or inter-agency agreements, Tribal Recipients are advised to include provisions in such agreements to ensure that

other parties to the agreement comply with the BAP and provide sufficient purchase documentation to Tribal Recipients to enable them to demonstrate BABA compliance and provide the documentation for your records.

12. Submitting a Specific Waiver Request

If a Tribal Recipient is unable to reasonably procure U.S. made covered materials, the purchase or project may qualify for a specific waiver. Each specific waiver requires supporting documentation demonstrating the need for the waiver. [HUD's BABA website](https://www.hud.gov/program_offices/general_counsel/build_america_buy_america/waiver) provides instructions for submitting a specific waivers on the "What if I need a Waiver?" web page at: https://www.hud.gov/program_offices/general_counsel/build_america_buy_america/waiver.

The three types of specific waivers for which a Tribal recipient may apply are described below.

A. Non-Availability Waivers may be requested if the product you need is not produced in the United States in sufficient quantities or of a satisfactory quality. To support this waiver request, Tribal Recipients would:

- Describe the quantity and quality specifications required for the covered material;
- Demonstrate that the market research conducted adequately considered items that meet the definition of Made in America but found that these materials were not available in sufficient quantities or not of satisfactory quality;
- Describe the due diligence performance including market research results, quotes from vendors, and/or responses from manufacturers, distributors, or suppliers; and
- Demonstrate that only the foreign sourced covered materials found in the market research are available in sufficient quantities or of satisfactory quality.

B. Unreasonable Cost Waivers may be requested if the inclusion of the product in the United States will increase the cost of the overall project by more than 25 percent. To support this waiver request, Tribal Recipients would:

- Describe the project and related planned procurements under the project;
- Demonstrate that market research was conducted and adequately considered items that meet the definition of Made in America;
- Describe the due diligence performance including market research results, quotes from vendors, and/or responses from manufacturers, distributors, or suppliers;
- Determine additional cost of BABA-compliant products compared to other products;
- Demonstrate that BABA compliance increases total project costs by more than 25%; and
- Determine the dollar amount to be waived.

C. Public Interest Waivers may be requested if the use of the American made product would be inconsistent with the public interest. To support this waiver request, Tribal Recipients would:

- Explain how waiving the BABA requirement for this project or covered material served the public interest; and
- Demonstrate definite impacts on the community if specific items, products, or materials are not utilized in an infrastructure project.

The waiver requests can be submitted through HUD's BABA Waiver Portal at <https://babawaiver.hud.gov/>. Please note there is no mechanism to save an unfinished application or update information. Therefore, grantees must collect all information before beginning the waiver application. If you are unable to process the waiver request via the portal due to connectivity issues, you may submit the HUD BABA Specific Waiver Form to your Area ONAP for processing.

Prior to starting the waiver application in the portal, you can preview the questions on the [HUD BABA Specific Waiver Form](#). Note that only direct Tribal Recipients can submit waiver requests to HUD so you will need to coordinate with your contractors or sub-recipients on any waiver requests they require.

HUD will review each waiver request and submit it to the OMB Made in America Office for final review pursuant to BABA section 70923(b). The waivers will be published in the Federal Register for a 15-day public comment period. OMB approved waivers will be posted to www.MadeInAmerica.gov and a notice of waiver approval will be issued to the requestor. Until final specific waiver approval is granted, Tribal Recipients should not proceed with procurements that would not be compliance with BABA.

13. Non-Availability Waivers for Unique Tribal Conditions

Tribal Recipients may also demonstrate support for a non-availability or other waiver by showing that a particular product is not available due to unique Tribal conditions restricting availability of the U.S. made products. Tribal Recipients should document the condition and its impact. Justification for how the unique condition makes the domestic product effectively not available will be required for the waiver request. The following are examples of unique Tribal conditions restricting availability.

- A. Short Construction Season/Extreme Weather or Environmental Conditions:** Such a justification could include a description of the short construction season due to extreme weather or environmental conditions that has made it impractical for the Tribal Recipient to purchase BAP-compliant materials in a timely manner. The justification should be detailed and provide strong evidence to support a waiver request.
- B. Shipping Restrictions:** If a domestic material must be shipped by barge, air cargo or other limited or extreme means of transportation, it may be impractical for the Tribal Recipient to purchase BAP-compliant materials in a timely manner. The justification should be detailed and provide documentation of restrictions like barge schedules, lack of roads, or shortage of available contract pilots.
- C. Lack of Vendors:** Demonstrate that due to its remote locations, the Tribal Recipient cannot effectively access BAP-compliant materials from vendors. Specifically, the

manufacturer or vendor will not ship to Tribal Recipient, does not respond to material inquiries, or cannot provide cost estimates, therefore the product is not available to the recipient. The justification should include documentation of the vendor's inability to do business with the recipient.

D. Lack of Contractors: Demonstrate product unavailability based on the inability to effectively solicit a sufficient number of bids from available contractors due to BAP requirements. The justification should demonstrate that the recipient complied with all applicable procurement requirements, including requirements governing competitive procurement, but despite repeated attempts, an insufficient number of bids were received.

E. Indian Preference and Tribal Preference in Contracting: Demonstrate that by complying with the BAP, the Tribal Recipient is unable to also comply with Federal Indian preference (section 7(b) of the Indian Self-Determination and Education Assistance Act, (25 USC 5307(b)) or Tribal preference requirements (e.g. section 101(k) of NAHASDA (25 USC 4111(k)) governing employment and contracting. The justification should cite the preference policies and demonstrate the lack of qualifying bids received.

F. Conditions Beyond the Control of the Tribal Recipient: Demonstrate that due to other conditions beyond the control of the Tribal Recipient, BAP-compliant material is not readily available. Tribal Recipients should provide HUD with strong evidence demonstrating reasons beyond their control.

14. Record Retention

Tribal Recipients are required to maintain a record of BABA compliance for a period consistent with existing records retention requirements for the relevant HUD program (see *e.g.*, [24 CFR 1000.552](#) for IHBG and [24 CFR 1003.501\(a\)\(10\)](#) for ICDBG). When leveraging federal funding, if there are no program-specific records retention requirements, follow "Record retention requirements," under [2 CFR 200.334](#) as applicable to Federal grants.

15. BABA Implementation Recommendations

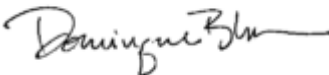
Tribal Recipients may consider utilizing the following strategies in preparation for BABA implementation effective October 1, 2024.

- Assess current and planned projects for BAP applicability.
- Research availability of covered materials made in the U.S. from your usual vendors.
- Research new vendors offering BABA-compliant covered materials.
- Revise template contracts, solicitations, and agreements to include BAP requirements.
- Revise Tribal procurement policies and procedures to include BAP requirements.
- Require contract bidders to submit both BABA-compliant and non-BABA-compliant proposals. Contractor bids reflecting that BABA-compliant materials are not available can be used as a basis for a non-availability waiver.

16. Request for Comment

In crafting this Notice, HUD attempted to balance BABA’s intent to stimulate U.S. production of iron, steel, construction materials and manufactured products with the need for processes and procedures that recognize practical challenges Tribal Recipients will face in carrying out vital grant activities. HUD expects BABA requirements to substantially impact grantee operations. Therefore, although this Notice is effective upon publication, HUD seeks comment from Tribal Recipients and other interested members of the public regarding this Notice. Comments received in response to this solicitation will aid HUD in developing additional implementation actions and guidance. Please email comments to BuildAmericaBuyAmerica@hud.gov using the following subject line: “Comment on BABA Notice for Tribal Recipients.”

ONAP will provide additional BABA implementation guidance and training. If you have any questions regarding this Notice, contact your Area ONAP.

 for

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

APPENDIX A

Definitions Applicable to this Notice

Key terms that have relevance to the interpretation and implementation of the BAP for ONAP and HUD programs are defined in the BABA statute and may be found in 2 CFR part 184 and OMB guidance. 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 (BABA) 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 (BAP) 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.

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 includes the following when used in connection with an Infrastructure project:

- All iron and steel
- All Manufactured Products
- All Construction Materials.

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 recipient or subrecipient 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 in a grant program instead of procuring labor or services through contract.

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.

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.

Obligate means an action taken by HUD that creates a legal liability of the government for the payment of goods and services ordered or received or that administratively recognizes a legal duty on the part of the Agency that could mature into a legal liability by virtue of actions outside of HUD's control. The milestone in the federal assistance award process that establishes the obligation date varies for each program, but for many ONAP programs, such as IHBG, the obligation date occurs upon HUD's execution of the grant agreement.

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.⁵

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.

Project means the construction, alteration, maintenance, or repair of infrastructure in the United States. (Section 70912(7) of BABA).

Recipient is defined in 2 CFR 200.1 ([89 Fed. Reg. 30046](#), 30143 (April 22, 2024) effective October 1, 2024) and means an entity that receives a Federal award directly from a Federal agency to carry out an activity under a Federal program. The term recipient does not include subrecipients or individuals that are participants or beneficiaries of the award.

⁵ Language adapted from the Federal Acquisition Regulation (FAR) definition of procurement/acquisition at 48 CFR 2.101.

Section 70917(c) materials are 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).

Subrecipient is defined in 2 CFR 200.1 ([89 Fed. Reg. 30046](#), 30144 (April 22, 2024) effective October 1, 2024) and means an entity that receives a subaward from a pass-through entity to carry out part of a Federal award. The term subrecipient does not include a beneficiary or participant. A subrecipient may also be a recipient of other Federal awards directly from a Federal agency.

Tribal Recipient means recipients or subrecipients of FFA provided by HUD and includes all recipients and subrecipients of grants or loan guarantees administered by HUD's Office of Native American Programs (ONAP). This includes Indian Tribes and TDHEs receiving grants and loan guarantee assistance under the Native American Housing Assistance and Self-Determination Act's (NAHASDA's) Indian Housing Block Grant Program and Title VI Loan Guarantee Program, and Indian Tribes and Tribal Organizations receiving Indian Community Development Block Grant funds under the Housing and Community Development Act of 1974. It also includes FFA provided by HUD to the Department of Hawaiian Home Lands (DHHL), which receives annual grant funding under the Native Hawaiian Housing Block Grant (NHHBG) program. It also includes Tribal recipients of other HUD grants aside from ONAP Grants.

APPENDIX B

Sample BABA Language for Contracts and Subrecipient Agreements

Tribal Recipients should include the following BABA language in all contracts and agreements with subrecipients, contractors, developers and subgrantees, as well as in any procurement bid documents to ensure BABA compliance by subgrantees, developers and/or contractors:

Pursuant to the Build America, Buy America Act (BABA), enacted as part of the Infrastructure Investment and Jobs Act. Pub. L. 117-58, 41 U.S.C. § 8301 note, the Tribal Recipient of 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 public infrastructure, including buildings and real property, unless application of the BAP has been waived by HUD. Accordingly, this agreement shall be carried out in accordance with BABA.

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

APPENDIX C

ONAP Buy America Preference Applicability Determination Checklist

This checklist is an optional tool that Tribes/TDHEs may use or adapt to assist with determining if the Buy America Preference (BAP) applies to a public infrastructure project funded by a covered ONAP program. Retain for procurement recordkeeping purposes.

I. Project Information- Complete the Project Information below.

GRANT PROGRAM:

GRANT NUMBER:

GRANT OBLIGATION DATE:

(date grant agreement signed by the AONAP Administrator)

AMOUNT OF ONAP GRANT FUNDING: \$

AMOUNT OF OTHER FUNDING: (if applicable)

PROJECT DESCRIPTION: (Type of project and the beneficiaries, i.e. Low-Income Tribal Housing)

Number of Dwelling Units in the Project (Total number and type of dwelling units in the project)

II. Applicability Determination – Answer the following questions to determine whether and how the BAP is applicable to your project.

1. Is the project a Public Infrastructure project, consistent with 2 CFR 184 and OMB Guidance M-24-02?

Yes. Continue to Question 2.

No. The project is not a public infrastructure project. If you answer 'No', the BAP does not apply. Stop here.

2. Is the project funded using a covered ONAP grant program? Check all that apply in chart 2.a.

2.a. Funded with BAP Covered ONAP Grant Programs

Table with 2 columns: checkbox, program name (IHBG, IHBG-COMP, NHHBG, ICDBG Single Purpose, Title VI Loan Guarantee)

Yes. Continue to Question 3.

- No.** The Activity or Project is not funded **in any part** with BAP Covered ONAP Grant programs. *If you answer 'No', the BAP does not apply. Stop here.*

Note: Projects funded entirely using the following ONAP Grant programs are not subject to the BAP:

- *IHBG-CARES*
- *IHBG-ARP*
- *NHHBG-ARP*
- *ICDBG-IT*
- *ICDBG-CARES*
- *ICDBG-ARP*
- *Tribal HUD VASH*
- *Section 184 Native American Home Mortgage Guarantee.*

- 3. Will covered materials, as defined in 2 CFR 184, be used in the project? Check all materials in chart 3.a. that apply.**

3.a. BAP Covered Materials Used in Project

<input type="checkbox"/>	Yes, Iron or steel is used.
<input type="checkbox"/>	Yes, Specifically Listed Construction materials are used.
<input type="checkbox"/>	Yes, Manufactured products are used.

- Yes.** *Continue to Question 4.*

- No,** the project will not incorporate any covered materials. *If you answer 'No', the BAP does not apply. Stop here.*

- 4. Is the Grant Obligation Date of the covered ONAP Grant Program funds (the date the grant agreement was signed by the AONAP Administrator) used to purchase covered materials on or after October 1, 2024?**

- Yes.** The Obligation Date of the covered funding used to procure the following covered materials was on or after October 1, 2024.

- No.** The Obligation Date of the covered funding used to procure the covered materials was before September 30, 2024. *If you answer 'No', the BAP does not apply. Stop here.*

- 5. Does the procurement of Covered Material fall within the *De Minimis* exemption under Section 203(g) of NAHASDA?**

- Yes.** The procurement is entirely funded by IHBG funds and totals less than \$5,000.

- No. The procurement is funded in whole or in part by federal funds aside from IHBG and/or the value of the procurement is more than \$5,000.

6. Do either of the following HUD General Waivers apply to the project? *Check all waivers in chart 6.a. that apply.*

Public infrastructure projects that meet the conditions of a general waiver may be exempt in whole or in part from the BAP.

- Yes.** The HUD general waiver(s) selected below apply to this project.

6.a. HUD General Waivers: Small Purchase and Exigent Circumstances

- The total cost of the project from all sources (Federal and non-Federal) is \$250,000 or less. If checked, the Small Purchase Waiver applies, and the project is exempt from the BAP.

- There is an urgent need to immediately complete the project because of a threat to life, safety, or property. If checked, the Exigent Circumstances Waiver applies, and the project is exempt from the BAP.

Attach documentation of the conditions of the waiver to this checklist and retain in the procurement record. If you answered 'Yes', the BAP does not apply. Stop here.

- No.** The HUD General Waivers listed above do not apply to this project. *Continue to Question 7.*

7. Was the *de minimis* waiver applied to a portion of the cost of Covered Materials?

The BAP can be waived for covered materials from foreign or unknown sources at a cost at or below the de minimis limit of 5% of the total cost of covered materials or \$1,000,000 (whichever is less). The BAP will still apply to other covered materials used in the project.

- Yes.** The *de minimis* waiver was applied to 5% (or \$1m, whichever is less) of the total cost of **covered materials**, as listed in line c. in chart 7.a. below.

7.a. De Minimis Waiver Calculation

a. Enter the total cost of all Covered Materials:	\$
b. Multiply the cost of all Covered Materials by 0.05 (5%):	\$
c. Costs for which the BAP can be waived (the lesser of the amount in line b. or \$1,000,000)	\$

Complete the chart above and attach a list of covered materials and their associated costs to which the de minimis limit has been applied. Continue to Question 7.

No. The *de minimis* waiver was not applied. *Continue to Question 8.*

8. Is there a need to request a project-specific or product-specific waiver?

If the BAP applies to a project and general waivers are not applicable, then a grantee may consider whether to apply for a project-/product-specific waiver.

Yes. A project-specific or product-specific waiver must be approved by the Office of Management and Budget (OMB) before it is published. *Refer to the BABA Implementation Guidance for Tribal Recipients for instructions on submitting a waiver request.*

No. The BAP is applicable to the project, and it will be procured in compliance with BABA.

Completed by

Date Completed