



# BUILD AMERICA BUY AMERICA FREQUENTLY ASKED QUESTIONS

**1. Is BABA applicable to the aggregate grant amount or to the total cost of each separate project where multiple properties are included under a Community Development Block Grant - Downtown Revitalization Opportunity (DTR) grant?**

This would depend on the facts of the particular grant and related projects with reference to the definitions and example projects from the CPD BABA Quick Guides referenced below.

If the projects under a given CDBG-DTR grant were separately planned and budgeted, maintained separately bidding or procurement processes, separately bid and completed under different construction contracts, and completed at different times, the Department will likely conclude that BABA should be applied separately to each separate project. However, if the projects are closely related in type and simultaneously completed under the same design plan, budget and relative timing, then BABA would be applicable to the aggregate project. Other factors, e.g., different ownership, same contractors, etc., may be considered in this determination.

“Infrastructure” is described in 2 CFR 184.4(c) and 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).

The term “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, U.S. Department of Housing and Urban Development, Office of Community Planning and Development, CPD Implementation Guidance for the Build America, Buy America Act’s domestic content procurement preference as part of the Infrastructure Investment and Jobs Act, Notice: CPD-2023-12, Issued November 2, 2023, Section II. Definitions, at J. Infrastructure, and K. Infrastructure Project.

**2. How does BABA apply to Owner-Occupied Rehab Program projects?**

Single-Family Owner-Occupied Rehab Program. A participating jurisdiction (PJ) operates a single-family owner-occupied rehabilitation program using HOME funds obligated after August 23, 2024. The PJ determines that since the total project costs from all sources for each activity do not exceed \$250,000, individual rehabilitation activities are covered by the Small Grant Waiver and do not need to comply with the BAP.

See, Community Planning & Development, Quick Guide, Build America, Buy America Act: Buy America Preference for CPD Programs, What is the Buy America Preference, Project Examples, at Page 7 [undated].

Owner-Occupied Rehab Program. A grantee operates an owner-occupied rehabilitation program using FY2024 and FY2025 CDBG funds. The maximum allowable rehabilitation budget for each property is \$100,000.

- The grant funds were obligated after November 15, 2022.
- The per property budget does not exceed \$250,000.

Does the BAP apply to this project?

No, the BAP does not apply to this program because the budget for each property (i.e., project) does not exceed \$100,000 and thus each individual project is exempt from the BAP under the De Minimis and Small Grants Waiver.

See, Community Planning & Development, Quick Guide, Build America, Buy America Act: Buy America Preference for CDBG Grantees, Overview of Buy America Preference, Example Projects, at Page 5 [undated].



### **3. Is BABA applicable to infrastructure projects involving single-family owner-occupied residences?**

No. 2 CFR 184.4(c)-(d) provides guidance on the meaning of infrastructure under BABA. Section 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.

OMB also provides a definition of “infrastructure project” at 2 CFR 184.3. Section 184.4(d) explains that Federal agencies should interpret the term “infrastructure” broadly and consider the description provided in section 184.4(c) as illustrative and not exhaustive. Section 184.4(d) also explains that, when determining if a particular construction project of a type not listed in section 184.4(c) constitutes “infrastructure,” agencies should consider whether the project will serve a public function, including whether the project is publicly owned and operated, privately operated on behalf of the public, or is a place of public accommodation, as opposed to a project that is privately owned and not open to the public. Through this memorandum, OMB notes that projects with the former “public” qualities have greater indicia (or distinguishing features) of “infrastructure,” while projects with the latter “private” quality have fewer. As a result, projects consisting solely of the purchase, construction, or improvement of a private home for personal use, for example, would not constitute a public infrastructure project for purposes of BABA. Federal agencies are strongly encouraged to consult with OMB when making such determinations or if they are uncertain about the applicability of this guidance to any particular infrastructure program.

See, White House Office of Management and Budget, Memorandum: Implementation Guidance on Application of Buy American Preference in Federal Financial Assistance Programs for Infrastructure, M-24-02, Page 3, dated October 25, 2023.

### **4. Does BABA apply to tools, supplies, furniture, equipment, furnishings, and other moveable property?**

A Buy America preference only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project. As such, it does not apply to tools, equipment, and supplies, such as temporary scaffolding brought to the construction site and removed at or before the completion of the infrastructure project. Nor does a Buy America preference apply to equipment and furnishings, such as movable chairs, desks, and portable computer equipment, that are used at or within the finished infrastructure project, but are not an integral part of the structure or permanently affixed to the infrastructure project.

See, White House Office of Management and Budget, Memorandum: Implementation Guidance on Application of Buy American Preference in Federal Financial Assistance Programs for Infrastructure, M-24-02, Page 4, dated October 25, 2023.

### **5. Does BABA apply to subrecipients or contractors?**

Grantee. The term “grantee,” as defined at 24 CFR 5.100, means the person or legal entity to which a grant is awarded and that is accountable for the use of the funds provided.

See, U.S. Department of Housing and Urban Development, Office of Community Planning and Development, CPD Implementation Guidance for the Build America, Buy America Act’s domestic content procurement preference as part of the Infrastructure Investment and Jobs Act, Notice: CPD-2023-12, Issued November 2, 2023, Section II. Definitions, at H. Grantee.

In most cases, yes, the BAP requirements apply to subgrantees, including subrecipients, contractors, and developers who are awarded Federal financial assistance for use in public infrastructure projects. The BAP requirements apply to all federal financial assistance (“FFA”) and do not distinguish between the end user of the federal funds. The BAP applies as long as the funding is derived from a Federal agency, even if they are a pass-through entity, unless a particular section of the terms and conditions of the Federal award specifically

## 6. What type of records need to be maintained?

To comply with BABA, the BAP must be included in the terms and conditions of all federal awards including subawards, contracts, and purchase orders for the work performed or products supplied for infrastructure projects. CPD grantees should document the process to analyze if the BAP applies to a project using the approach in this Notice and collect records to demonstrate compliance with BABA requirements. Records should be consistent with existing records retention requirements for each of the Covered CPD programs. If there are no CPD program-specific records requirements, the CPD grantee may follow “retention requirements for records,” under 2 CFR § 200.334 as applicable to Federal grants.

HUD will issue guidance about reporting on BABA required activities under 24 CFR 91.520, at a later date. At this time, CPD is working to include the BAP into its existing CPD systems (Integrated Disbursement and Information System, Disaster Recovery Grant Reporting System) for grantees to generate reports to track progress and compliance with BABA. Additional details on record keeping requirements will be determined by HUD and shared with CPD grantees as it is available.

See, U.S. Department of Housing and Urban Development, Office of Community Planning and Development, CPD Implementation Guidance for the Build America, Buy America Act’s domestic content procurement preference as part of the Infrastructure Investment and Jobs Act, Notice: CPD-2023-12, Issued November 2, 2023, Page 20.

## 7. Is there a process that a grantee should follow to analyze if the BAP applies to a project?

Applying the BAP and HUD Waivers to CPD Programs once the BAP applies to an infrastructure project, a grantee must:

1. Comply with the BAP, or
2. Utilize one of HUD’s general waivers, or
3. Obtain a project-specific waiver to exclude the project from the BAP.

As a part of its record keeping, a CPD grantee should document its process to analyze if the BAP applies to a project using the approach below:

**Step 1: Type of Project.** Are the funds being used for a public infrastructure project, as defined by BABA and explained in this notice?

- If yes, proceed to step 2.
- If no, the BAP does not apply. The BAP only applies to infrastructure projects.

As a part of its record keeping, a CPD grantee should document its process to analyze if the BAP applies to a project using the approach below:

**Step 2: Funding Source.** Identify the source(s) of the project funding, including CPD funding, HUD funding or other Federal agency funding that must comply with BABA. Does the project funding include any Covered CPD Programs listed in this notice? (Note: BAP does not apply to funds that are for pre- or post-disaster or emergency response.)

- If yes, and HUD contributes the largest portion of Federal funds to the project, proceed to step 3.
- If yes, and another Federal agency contributes the largest portion of Federal funds to the project, that Federal agency is the “Cognizant Agency for Made in America”, and the grantee should follow that agency’s guidance for applicability of the BAP to the project.
- If no, then the project does not need to comply with the BAP for CPD funds but may need to comply with the BAP due to the inclusion of other HUD or Federal funding sources.

**Step 3: Materials.** Identify the materials that will be used in this infrastructure project. Does the project use materials subject to the BAP (iron or steel, specifically listed construction materials, not listed construction materials, or manufactured products), identified in this Notice?

- If yes, proceed to step 4.
- If no, then the BAP does not apply. The BAP only applies to covered materials.

**Step 4: Date of Obligation.** Consult the Phased Implementation Waiver schedule table. Identify the cell that corresponds to the Covered CPD Program funding and materials used in your project. This cell identifies the date on which the BAP will apply for the Covered

CPD Program and the materials. Based on the date of obligation of the Covered CPD Program funds, does the BAP apply to the funding source and materials that will be used in your project?

- If yes, proceed to step 5.
- If no, the BAP does not apply.

**Step 5: General Waivers.** Consider the available HUD General Waivers. As of this Notice, there are three general waivers that may be utilized as an alternative to compliance with the BAP under the Phased Implementation Waiver: 1) Exigent Circumstances Waiver, 2) the De Minimis, Small Grants, and Minor Components Waiver, and 3) the Tribal Recipients Waiver. Analyze each available HUD general waiver, based upon the specific requirements of that waiver.

1. Exigent Circumstances Waiver: Is there an urgent need to immediately complete the project because of a threat to life, safety, or property of residents and the community?
  - If yes, the Exigent Circumstances Waiver may apply, and the project would not be subject to the BAP.
2. De Minimis, Small Grants, and Minor Components Waiver: Is the total cost of the project equal to or less than \$250,000?
  - If yes, the De Minimis, Small Grants, and Minor Components Waiver may apply, and the project would not be subject to the BAP.

OR

This waiver can be applied to a portion of the products used in an infrastructure project if the cumulative cost of those products does not exceed five percent (5%) of the total cost of covered products used in the project (up to \$1 million).

- In that case, the BAP would be waived for part of the project, but the rest of the project would still need to comply with the BAP.

3. Tribal Recipients Waiver: Is the project being funded by a Tribal recipient?
  - If yes, the Tribal Recipients Waiver may apply, and the project would not be subject to the BAP. (This is rare for CPD programs.)
  - If no to General Waiver questions 1, 2, and 3, proceed to Step 6.

**Step 6: Specific Waivers.** Consider the criteria for project-specific waivers. Project-specific waivers to the BAP may be available if it is determined that a waiver falls into one of the following three categories: 1) when applying the domestic content procurement preference would be inconsistent with the public interest, 2) when types of iron, steel, manufactured product or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality, or 3) where the inclusion of those products and materials will increase the cost of the overall project by more than 25 percent. Project-specific waivers are available on a limited, case-by-case basis, after HUD's consultation and review with OMB's MIAO.

1. Would applying the BAP to the project be inconsistent with the public interest?
  - If yes, a project-specific waiver may be considered.
2. Are the types of iron, steel, manufactured products, or construction materials used in the project not produced in the United States in sufficient and reasonable available quantities or of a satisfactory quality?
  - If yes, a project-specific waiver may be considered.
3. Would the inclusion of iron, steel, manufactured products, or construction materials produced in the United States increase the cost of the overall project by more than 25 percent? If yes, a project-specific waiver may be considered.
  - If no to Project specific waiver questions 1, 2, and 3, the BAP likely applies to the project and the project should comply with the requirements of the BAP.

Grantees should consult the entirety of this Notice and other applicable BABA guidance before making a determination on BAP applicability to a specific project. Grantees should reach out to their local CPD field office if they require additional assistance with determining BAP applicability.

See, U.S. Department of Housing and Urban Development, Office of Community Planning and Development, CPD Implementation Guidance for the Build America, Buy America Act's domestic content procurement preference as part of the Infrastructure Investment and Jobs Act, Notice: CPD-2023-12, Issued November 2, 2023, Pages 15-17.