



BUILD AMERICA BUY AMERICA (BABA) POLICY GUIDANCE

DATE: December 13, 2024

SUBJECT: Policy and Procedure, The Build America, Buy America Act (BABA) signed into law on November 15, 2021, as part of the Infrastructure Investment and Jobs Act (IIJA) as Sections 70901-52 of Pub. L. No. 117-58.

This policy memorandum describes the policies and procedures of the Nebraska Department of Economic Development (DED) regarding the implementation of BABA in DED's various grant and award programs, which are subject to BABA, including Home Investments Partnerships Program (HOME), National Housing Trust Fund (HTF), and Community Development Block Grant (CDBG). See discussion and link to Phased Implementation Schedule below. BABA requirements do not apply to federal funds used for "pre- and post-disaster or emergency response", such as Community Development Block Grant Disaster Recovery (CDBG-DR) grants, nor to Community Development Block Grant CARES Act (CDBG-CV) grants or DED's HOME Investment Partnerships American Rescue Plan Program (HOME-ARP).

In the event of any conflict between this policy memorandum and any other relevant guidance published by this DED, this document controls. In the event of any conflict between this policy memorandum, and relevant federal statutes, regulations, Office of Management and Budget (OMB) and U.S. Department of Housing and Urban Development (HUD) guidance, such federal authority will control.

This policy memorandum remains effective until it is amended, superseded, or rescinded.

POLICY AND PROCEDURE

BABA applies to HUD's recipients of Federal Financial Assistance (FFA), meaning grants, cooperative agreements, direct assistance, loan guarantees, and other financial assistance, which were obligated by HUD after the implementation date for BABA. BABA requires that all iron, steel, manufactured products, and construction materials, used in an "infrastructure project" with any FFA must be produced in the United States of America (USA), unless the awarding Federal Agency has issued an applicable waiver. This requirement to purchase materials made in the USA is called the Buy American Preference (BAP). The BAP applies to infrastructure projects in the United States using FFA, regardless of whether infrastructure is the primary purpose.

Public infrastructure, under 2 CFR 184.4, is described as including the structures, facilities, and equipment for, in the USA, (A) roads, highways, and bridges, (B) public transportation, (C) dams, ports, harbors, and other maritime facilities, (D) intercity passenger and freight railroads, (E) freight and intermodal facilities, (F) airports, (G) water systems, including drinking water and wastewater systems, (H) electrical transmission facilities and systems, (I) utilities, (J) broadband

infrastructure, (K) buildings and real property, and (L) structures, facilities, and equipment that generate, transport, and distribute energy including electric vehicle (EV) charging. This description is illustrative and not exhaustive.

When determining if a particular project of a type not listed in the description constitutes "infrastructure," consideration is given to 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. Specific information about infrastructure projects can be found at the link [State of Nebraska, Department of Economic Development, BABA Frequently Asked Questions](#) below.

The effective date for BABA implementation was May 14, 2022; however, HUD approved a waiver that extended the effective date for all programs until November 14, 2022. Therefore, BABA does not apply to awards made prior to November 14, 2022. HUD approved further extensions to the implementation date through a Phased Implementation waiver that creates a schedule of when the BAP will apply to various HUD programs

through FY2025 depending on the program and product. HUD's Phased Implementation Schedule can be viewed at the link [Does BABA Apply to Me?](#) below.

Recipients must include the BAP in all subawards, contracts, and purchase orders for the work performed, or products supplied under the Federal award. The BAP flows down to subawards to subrecipients unless the terms of the Federal award indicate otherwise.

HUD released Notice CPD-23-12 on November 2, 2023, which provides BABA's phased implementation guidance, covered Community Planning and Development (CPD) programs, steps for project analysis, and available waivers. DED signed its FY2023 and FY2024 Funding Agreement with HUD obligating funds on September 26, 2023, thereby necessitating the following BABA requirement to be included in subrecipient agreements thereafter:

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

Subrecipients shall further include this clause in any procurement bid/contract documents on or after September 26, 2023, to ensure BABA compliance by subgrantees, developers and/or contractors. Notice CPD-23-12 can be found at the link [HUD, CPD Implementation Guidance for the BABA's domestic content procurement preference as part of the Infrastructure Investment and Jobs Act; NOTICE: CPD-2023-12, November 2, 2023](#) below.

General Waiver(s). Effective November 23, 2022, HUD issued a Small Grants waiver for infrastructure grants and expenditures whose total cost is equal to or less than \$250,000, a waiver for a De Minimis portion of an infrastructure project, waiving BABA requirements for a cumulative total of no more than 5% of the total cost of iron, steel, manufactured products, and construction materials, up to a maximum of \$1 million, and an

Exigent Circumstances waiver, when there is an urgent need by a grantee to immediately complete an infrastructure project because of a threat to life, safety, or property of residents and the community. While there is no expiration with respect to the application of BABA requirements, the Small Grants, De Minimis, and Exigent Circumstances "General" Waivers are in effect for five (5) years from the effective date above. A separate waiver exists for Tribal Consultations regarding Tribal recipients.

Grantees do not need to request HUD or DED approval to rely on a General Waiver but must maintain documentation evidencing a determination that the waiver applies in its project file. Specific information about the foregoing General Waivers can be found at the link [What If I Need a BABA Waiver?](#) below.

Specific Waiver(s). Specific Waivers, for a particular project or product, may be granted on a case-by-case basis, on the following basis: 1) Public Interest - requiring the use of the USA made product would be inconsistent with the public interest, 2) Nonavailability - the product needed is not produced in the USA in sufficient quantities or of a satisfactory quality, or 3) Unreasonable Cost - the inclusion of the product produced in the USA will increase the cost of the overall project by more than 25%.

Specific Waiver requests must be made at the link [BABA Specific Waiver Submission Site](#) below. HUD reviews such requests before posting to the Federal Register for public comment and forwarding to the OMB, Made In America Office (MIAO), for approval. Approvals are posted to the Federal Register and on the MIAO website. Only direct HUD recipients (grantees and public housing authorities) may submit a Specific Waiver application. Direct recipients (including DED) should coordinate with their subgrantee(s) or subcontractor(s) to collect necessary information for a specific waiver application. Additional rules apply to projects funded by multiple federal agencies.

BABA Self-Certification Form(s). DED awardees must complete and submit to DED a BABA Self-Certification Form (including attachments) for each outstanding award subject to BABA, along with the self-certification form(s) (including attachments) of any contractors, subcontractors, material suppliers, vendors, etc., obtained by awardee in connection with the project upon completion of the final plans and specifications--and

of the final budget—for the project. The form can be found at the link [BABA Self-Certification Form \(DED\)](#) below. Such forms must be resubmitted upon any change in the representations contained therein, e.g., a change in a project design or materials making prior certification inaccurate, reliance on a General Waiver not previously certified, submission of a Specific Waiver request, etc.

DED awardees should submit Self-Certification forms to their respective Opportunity Managers. Additional guidance, answers to specific questions, and related information, can found at Frequently Asked Questions, BABA-HUD, [Frequently Asked Questions, BABA-DED](#), and HUD BABA Website links below.

APPLICABLE REGULATION AND GUIDANCE (LINKS)

HUD BABA Website, [Build America, Buy America \(BABA\) | HUD.gov](#)

[Does BABA apply to me? | HUD.gov](#)

[What if I need a BABA waiver?](#)

[BABA DED FREQUENTLY ASKED QUESTIONS](#)

HUD, CPD Implementation Guidance for the BABA's domestic content procurement preference as part of the Infrastructure Investment and Jobs Act; NOTICE: CPD-2023-12, November 2, 2023, [2023-12cpdn \(hud.gov\)](#)

Frequently Asked Questions, HUD's Implementation of BABA, https://www.hud.gov/program_offices/general_counsel/build_america_buy_america/faqs

RELATED REFERENCES

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, dated October 25, 2023; <https://www.whitehouse.gov/wp-content/uploads/2023/10/M-24-02-Buy-America-Implementation-Guidance-Update.pdf>

HUD BABA Project-Specific Waiver Submission Website and Resources, hud.gov; <https://www.hudexchange.info/news/baba-waiver-resources/>
See specific terms of your Award Contract and related Program Manual.