

Build America, Buy America Act



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Agenda

- BABA Overview
- Key Concepts
- Implementation
- Questions



What is the Build America, Buy America Act (BABA)?

- Enacted as part of the bipartisan Infrastructure Investment and Jobs Act on November 15, 2021.
- BABA requires that the following materials, in connection with infrastructure projects funded by Federal Assistance, must be produced in the United States:
 - Iron and steel
 - Construction materials
 - Manufactured products

What is the Build America, Buy America Act (BABA)?

- An infrastructure project is defined as any project that includes construction, alteration, maintenance or repair of:
 - Buildings and real property
 - Utilites (including drinking water and wastewater)
 - Broadband infrastructure
 - Electrical transmission facilities and systems (including EV charging)
 - Transportation infrastructure
 - Dams, ports and harbors and other maritime facilities

Federal Government-wide Law

- BABA applies to ALL Federal financial assistance used for an infrastructure project, including:
 - Grants
 - Loans and loan guarantees
 - Direct assistance
 - Non-cash contributions
 - Cooperative agreements
 - Other financial assistance

Federal Government-wide Law

- BABA is applicable to most HUD programs, including:
 - Community Development Block Grant (CDBG)
 - HOME
 - Housing Trust Fund
 - Many other programs, as well
- BABA does NOT apply to federally funded disaster or emergency assistance from the following programs:
 - CDBG – Disaster Recovery
 - CDBG - Mitigation
 - CARES Act programs, including CDBG-CV, HOPWA-CV, ESG-CV

Compliance and Implementation

–Project Items BABA Status Worksheet

- IEDA has created a worksheet to assist grantees in tracking BABA compliance
- This worksheet will be filled out with all BABA-covered products on your project along with their corresponding certifications throughout the project.
- The worksheet will be uploaded to the BABA Compliance tab on Iowa Grants.
- Simply follow instructions on the worksheet for easy completion.

Compliance and Implementation

–Step 1: Contract Language

- Specific contract language regarding BABA must be included in all contracts, including administration, engineering and construction.
- This language will be in the management guide.

Compliance and Implementation

–Step 2: Does BABA apply to your project?

- Is your project a defined infrastructure project? > No? BABA does not apply
- Is your project using a covered Federal program? > No? BABA does not apply
- Does your project use iron, steel, construction materials and manufactured products? > No? BABA does not apply
- Yes to all three? Congratulations! BABA applies to your project (*however, you may be eligible for a waiver*).
- Document this process on the worksheet to see if BABA applies to your project

Compliance and Implementation

–Step 3: Certification Process

- Grantees need to certify that all iron and steel, construction materials and manufactured products used on your projects are Made in America.
- The worksheet will make it easy to track each product's certifications.

Compliance and Implementation

–Step 3: Certification Process

- Engineer or architect will list all BABA-covered products in the bid packets.
- The winning contractor will then begin submitting manufacturer certifications for each BABA-covered product to the grant administrator. The grantee will be required to keep records of the certification documentation consistent with existing records retention.
- Grantees will take the engineer or architect's list of BABA-covered products and the contractor's corresponding certifications and include that information in the worksheet throughout the project.

Compliance and Implementation

–Step 3: Certification Process

- This certification submittal should begin prior to the start of construction. **No construction activity claim will be approved without certification that the contractor has met BABA requirements for that respective claim.**
- For each construction activity claim, the contractor and engineer will certify that materials used for that respective pay request is BABA-compliant. Grantees will provide that form for the contractor and engineer to certify.
- Grantees, upon submitting the claim to IEDA on Iowa Grants, will then certify that the claim is BABA-compliant. Grantees should have the certifications documenting compliance.

Compliance and Implementation

–Step 3: Certification Process

- The absence of a product certification could trigger the waiver request process.
- Grantees job to ensure that each item from the engineer or architect's list has a corresponding and appropriate certification as well as tracking any change orders in the project that will utilize new BABA-covered products.
- If the grantee does not have a certification for a specific product, you can't certify a claim and funding will be held until that certification is documented.

Compliance and Implementation

–Step 3: Certification Process

- Industries are already providing a letter of certification – many times right on their website.
- It will be the contractor’s responsibility to bring these certifications to the grantee.
- Items we’re looking for in the certification (there will be a sample in the Management Guide):
 - A reference to the project
 - Product specific information
 - Reference to the product’s BABA classification
 - Location where product was produced or manufactured
 - A company representative’s signature / contact information

Compliance and Implementation

–Step 4: Classification

- BABA applies to the following categories of products:
 - Iron and steel
 - Construction materials
 - Manufactured products
- A product cannot be classified in more than one of those categories
- Grantees should classify products based on their status when they arrive on the project site
- Use the worksheet to classify products

Project- and Product-Specific Waivers

- There are three available categories for project- and product-specific waivers:
 - Public interest
 - Non-availability
 - Unreasonable cost
- Grantee must work with the project's cognizant agency to submit a waiver
 - The cognizant agency is the agency with the most federal funding in the project
 - This process could take several months / plan for it
 - It could significantly delay your project

Public Interest Waivers

- A public interest waiver may be available if BABA compliance would be inconsistent with public interest.
 - Unclear what specific public interest issues BABA would cause
- Any waiver requests regarding public interest should:
 - Explain how waiving BABA requirements for the project or product serves the public interest.
 - Demonstrate definite impacts on the community if specific products or materials are used on your project.

Non-Availability Waivers

- A non-availability waiver may be available when a particular product needed for your project is not produced in the United States in sufficient quantities or of a satisfactory quality
- Any waiver requests for non-availability should:
 - Demonstrate that the grantee has conducted market research and adequately considered qualified alternate items.
 - Describe the due diligence performed, including information, quotes and/or responses from manufacturers, distributors or suppliers.

Unreasonable Cost Waivers

- An unreasonable cost waiver may be available when applying BABA will increase the cost of the OVERALL project by more than 25%.
- Any waiver requests for unreasonable costs should:
 - Demonstrate that applying BABA increases the total project cost by more than 25%.
 - Determine the additional cost of BABA-compliant products.
 - Determine the dollar amount to be waived.
 - Demonstrate that no domestic alternatives are available within the project budget.

HUD General Waivers

- There are general waivers which require no formal request to HUD
 - *De Minimis* Waiver
 - Small Grant Waiver
 - Exigent Circumstances Waiver
- Grantees should maintain documentation that demonstrates the applicability of a general waiver to the project.
- These waivers are effective until November 23, 2027

HUD General Waivers

- Small Grant Waiver

- BABA can be waived for a project if the total project cost (including all sources of funding – not just federal) is \$250,000 or less.

- Exigent Circumstances Waiver

- BABA can be waived if a project must be completed immediately due to protect life, ensure safety or prevent the destruction of property

HUD General Waivers

– *De Minimis* Waiver

- BABA can be waived for a portion of the products used in a project if the cost of those products comprises no more than 5% of the total cost of covered products used in the project (not to exceed \$1 million).
- Example: a grantee is using CDBG funding to construct a playground and can find domestically produced products for nearly all the playground equipment, except for one \$20,000 slide. The total cost of the products used in the project is \$500,000.
- The cost of the slide is less than 5% of the total cost of the covered materials so the *De Minimis* waiver can be applied to the slide, therefore BABA does not apply to the slide.
- Note that BABA still applies to the other products used in the project.

Bottom Line

- For project administration purposes, grantees must certify that all iron, steel, construction materials and manufactured products used in your projects are BABA certified.
 - No construction activity claim will be approved until IEDA is satisfied that all appropriate products in your claim are BABA-compliant
- Start with IEDA on any waiver. Ultimately, you will work with the project's cognizant agency to submit a waiver.
- Remember, this is new! Not every scenario can be foreseen so stay in contact with IEDA with your experiences, any challenges you face and your questions.

Resources and Questions

- There is guidance available!
- Questions? Contact me:
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