

Build America, Buy America Fact Sheet

Background

The Build America, Buy America (BABA) Act was signed into law on November 15, 2021, as part of the Infrastructure Investment and Jobs Act (IIJA) to create an incentive to increase domestic manufacturing across the country through the inclusion of BABA's Buy America Preference (BAP).

In general, the BAP requires that all iron, steel, manufactured products, and construction materials used in public infrastructure projects funded with Federal financial assistance must be produced in the United States. The intent of the BAP is to stimulate private-sector investments in domestic manufacturing, bolster critical supply chains, and support the creation of well-paying jobs for people in the United States. The BAP applies to all spending on public infrastructure projects by federal agencies, including the U.S. Department of Housing and Urban Development (HUD).

Applicability

BABA applies to projects awarded HOME Investment Partnerships (HOME) Program and/or National Housing Trust Fund (NHTF) Program funding that was obligated to Minnesota Housing from HUD on or after August 23, 2024.

Obligation is the point at which HUD is legally committed to make funds available to a grantee. Note that August 23, 2024, is the date on which HUD obligates funds to the grantee and should not be confused with the date on which a grantee commits funds to a specific project.

Products and Materials

The BAP applies to all iron and steel, construction materials, and manufactured projects used in an infrastructure project funded with Federal financial assistance. The following conditions apply when determining whether these products/materials are produced in the United States:

- For iron and steel items, all manufacturing processes, from the initial melting stage through the application of coatings, must occur in the United States.
- For manufactured products, the final manufacturing process must occur in the United States and the cost of components mined, produced, or manufactured in the United States must be greater than 55%.
- For construction materials, all manufacturing processes must occur in the United States.

All materials used should be classified as either iron or steel, construction materials, or manufactured products. Each material must be classified into *only one of these categories* based on the material's status when it arrives at the project site.

Additionally, section 70917(c) materials can be considered components of manufactured products if they are processed into a specific shape or form before being delivered to a work site.

Iron and Steel Products

Iron and Steel Products, as defined in [2 Code of Federal Regulations, title 2, section 184.3](#), means articles, materials, or supplies that consist wholly or predominantly of iron or steel, or a combination of both.

“Predominantly of iron or steel or a combination of both,” as defined in [2 C.F.R. 184.3](#), means that the cost of the iron and steel content exceeds 50% 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.

Construction Materials

Construction Materials, as defined in [2 C.F.R. 184.3](#), means articles, materials, or supplies that consist of only one of the items listed:

- Non-ferrous metals
- Plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables, including optic glass)
- Glass (including optic glass)
- Fiber optic cable (including drop cable)
- Optical fiber
- Lumber
- Engineered wood
- Drywall

Items that consist of two or more of the listed construction materials that have been combined through a manufacturing process and items that include at least one of the listed materials combined with a material that is not listed through a manufacturing process should be treated as manufactured products, rather than as construction materials. For example, a plastic framed sliding window should be treated as a manufactured product while plate glass should be treated as a construction material.

Minor additions of articles, materials, supplies, or binding agents to a construction material do not change the categorization of the construction material.

Manufactured Products

Manufactured Products, as defined in [2 C.F.R. 184.3](#), means articles, materials, or supplies that have been either:

- Processed into a specific form or shape
- Combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies

If an item is classified as an iron or steel product, a construction material, or a section 70917(c) material under [2 C.F.R. 184.4\(e\)](#), then it is not a manufactured product. However, an article, material, or supply classified as a manufactured product under [2 C.F.R. 184.4\(e\)](#) may include components that are construction materials, iron or steel products, or section 70917(c) materials.

Materials Not Subject to BABA

Cement, cementitious materials, aggregates (such as stone, sand, or gravel), and aggregate binding agents or additives are not subject to the BAP. These materials are not considered manufactured products when they are used or combined at a work site, such as wet concrete or hot asphalt mix. However, section 70917(c) materials can be considered components of manufactured products if they are processed into a specific shape or form before being delivered to a work site. For example, precast concrete is considered a manufactured product and is therefore subject to the BAP.

BABA does not apply to tools, equipment, and supplies (such as temporary scaffolding) brought to a construction site and removed at or before the completion of the project.

Minnesota Housing has further determined that BABA would not apply to "removable and/or movable" objects that are not an integral part of the structure or permanently affixed to the project. Therefore, BABA does not apply to building appliances (e.g., microwaves, refrigerators, dishwashers, AC units etc.), furniture, or equipment (e.g., movable chairs, desks, portable computer equipment, etc.).

Identifying and Locating Products and Materials

After identifying all products/materials subject to the BAP, the external project team will identify domestically available products.

- Engage with Enterprise MN (local MEP) to look for domestically available products.
- Work with the Made in America Office (MIAO), local MEP, and HUD, in addition to trade associations, local manufacturers, and local stores, to identify products that are made in America.
- Adequately consider qualified alternate items, products, or materials, and provide research supporting no alternative technology.

- Make a good faith effort to contact a minimum of three manufacturers or suppliers to determine if a BABA-compliant material is available in sufficient quantity and satisfactory quality.
 - Needed only when a product or material cannot be found domestically and will require a product-specific waiver.
- Information on domestic suppliers and manufacturers should be documented in the project specifications.
- Potential domestic procurement challenges should be identified as soon as the materials to be used in the project are known.

Waivers

With the concurrence of the MIAO, a federal agency may waive the application of the BAP when the agency finds that one of the following General or Product/Product Specific Waivers apply.

Project/Product Specific Waivers

Project/product-specific waivers are available on a limited, case-by-case basis after HUD's review, a public comment period, and final approval from the Office of Management and Budget (OMB)'s MIAO. Project-specific waivers are generally available for three reasons:

- **Nonavailability Waiver:** One or more iron or steel items, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality.
- **Unreasonable Cost Waiver:** The inclusion of one or more iron or steel items, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25%.
- **Public Interest Waiver:** Applying the domestic content procurement preference for one or more iron or steel items, manufactured products, or construction materials would be inconsistent with the public.

General Waivers

The De Minimis Waiver gives grantees the flexibility to waive the BAP for a 5% de minimis portion of materials used in a project if domestically produced equivalents cannot be identified, up to \$1 million.

- To determine the de minimis limit for a project, first calculate the total cost of Covered Materials (iron and steel, construction materials, and manufactured products) used in the project. Then, find 5% of that total.

- BABA requirements will still apply to the rest of the materials used in the project. HUD recommends calculating the De Minimis Waiver limit and apply it strategically before applying for a project-specific waiver.

The Tribal Recipient Waiver gives grantees the ability to waive BABA requirements for federally recognized Tribes to purchase non-domestic manufactured products for infrastructure projects funded with federal financial assistance.

Waiver Principles

Federal agencies must be judicious in their use of waivers. They should apply the following principles when developing waiver proposals:

- **Limited:** Waivers should be project- or award-specific whenever possible, and time-limited when not limited to certain projects or awards.
- **Targeted:** Waivers should cover only the products or category of products necessary (rather than covering broad sectors such as “all manufactured products”).
- **Conditional:** Agencies should consider including conditions on the waiver, when appropriate and consistent with law, that advance the goal of BABA policies.

Project/Product Specific Waiver Approval Process

The process to seek a waiver, as defined in HUD Notice CPD 2023-12, is as follows:

- The external team and Minnesota Housing prepare a BABA Waiver Request Form with the information required by the MIAO.
- Minnesota Housing submits the [Waiver Request Form](#) to HUD.
- The external team provides additional information to Minnesota Housing as requested by HUD during the review process to proceed with public comment in the Federal Register and final approval by the MIAO.

Agencies must post waivers for at least 15 days for public comment and should consult with the MIAO prior to posting a waiver with broader applicability (for example, program-level waiver) to ensure it covers no more than necessary.

Agencies are required to submit waivers to the MIAO for review after public comment to determine if it is consistent with policy, and the waivers must be approved and received prior to procurement commitment.

Compliance Requirements

Prior to submitting the 75-90% Contract Documents set to Minnesota Housing:

- Identify all products and materials needed for the project.
- Classify all products and materials needed for the project as iron and steel products, construction materials, or manufactured products.
- After identifying all products and materials subject to the BAP, identify domestically available products. See the information above for resources to help identify domestically made products and materials.
- Include in the project specifications:
 - The definition of domestically produced products/materials for iron and steel, construction materials, and manufactured products
 - BABA certification requirements for American-made products
 - Minnesota Housing's required BABA provision language:

The Grantee 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 Grantee'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.

Bid out the project in a way that provides two pricing scenarios – one with BABA requirements and one without BABA requirements to help document BABA's impact on overall project costs. After all bids are received back, identify the total cost of all products and materials subject to BABA. Throughout the process, the cost of all necessary products and materials subject to BABA need to be tracked to inform which products and materials not available domestically can be covered by the De Minimis Waiver.

Include BABA provision language in the construction contract. The general contractor must also ensure that the BABA provision language is included in all subcontracts, agreements for services, procurement contracts, and purchase orders.

Prior to and during construction:

- Collect certification documentation for all materials subject to BABA prior to executing subcontracts, agreements for services, procurement contracts, and purchase orders. Acceptable certification documentation includes, but is not limited to:
 - Copy of the label indicating the product was made in the United States
 - Copy of the product description or technical specifications that provides sufficient detail to conclude that the Covered Materials comply with BABA
 - Certificate or other documentation from the manufacturer demonstrating that the Covered Materials comply with BABA
 - Signed certification from the contractor of a project certifying compliance with BABA

- Signed certification from the manufacturer of the Covered Materials certifying compliance with BABA
- Track when a change order is needed when a specified product from the specifications is no longer available and notify Minnesota Housing as soon as possible.

Compliance and Record Keeping

Maintain documentation in accordance with 2CFR200 of the following and have available to submit to Minnesota Housing when necessary:

- Project documentation showing that BABA provision language is included in all required project specifications, construction contract, subcontracts, agreements for services, procurement contracts, and purchase orders
- List of products and materials subject to BABA, along with the categorization of these products and materials
- Documentation showing the cost of all products and materials subject to BABA
- All market research completed in the case that a project-specific waiver is needed for the project:
 - Results of a supplier scouting search conducted by local MEP or another supplier scouting service
 - Copies of web searches used (for example, PDF/JPEG copies of web pages showing search terms and results including sources considered, eliminated, and chosen for further research)
 - Copies of email, fax, or mail correspondence with Covered Materials manufacturers or suppliers
 - 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 reaching manufacturer or supplier staff who were able to respond to questions about BABA compliance, or whether the attempt at communication was unsuccessful (for example, 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 (for example, 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)
- Documentation from the manufacturer supporting that the Covered Materials were made in the United States