



BUILD AMERICA, BUY AMERICA COMPLIANCE POLICY

For Projects Receiving HUD Financing

Introduction

The Build America Buy America Act¹ (“BABA” or “the Act”) was enacted as part of the Infrastructure Investment and Jobs Act, Section 70901-52 of Pub. L. No. 117-58, on November 15, 2021. In general, the Buy America Preference (“BAP”) contained in the Act requires that all iron, steel, manufactured products and construction materials in infrastructure projects that receive federal financial assistance (“FFA”) be produced in the United States. KHC is tasked, as the grantee administering certain FFA (i.e., HUD programs), with ensuring any recipient, developer, contractor, subcontractor, grantee, or subrecipient of FFA complies with BAP.

For purposes of this policy, all terms and requirements related to BABA, including but not limited to “infrastructure project,” “covered materials,” “iron and steel,” “manufactured products,” and “construction materials” have the meanings provided in 2 CFR Part 184 and any applicable HUD guidance or notices. Recipients, contractors, subcontractors, and subrecipients are expected to comply with BABA based on these definitions. KHC may reference HUD guidance as needed to clarify applicability or compliance requirements.

Buy America Preference

When does the Buy America Preference apply to Federal Financial Assistance?

The BAP applies to infrastructure projects receiving certain applicable FFA. An “Infrastructure project” is defined as “any activity related to the construction, alteration, maintenance, or repair of infrastructure in the United States.”² Additionally, “infrastructure” includes buildings and real property.³

An infrastructure project is considered “public” infrastructure if the project is 1) publicly owned, or 2) privately owned but utilized for a public purpose. A project privately operated on behalf of the public or that is a place of public accommodation is considered a public infrastructure project subject to the BAP. Note: HUD defines housing projects of 5 or more units as public infrastructure.⁴

¹ BABA regulations are found at 2 CFR 184, and HUD implementation guidance was provided in Notice CPD-2023-12 and CPD-2025-01.

² 2 CFR §184.3

³ 2 CFR §184.4(c)

⁴ CPD-25-01, Section III

Covered Programs

The U.S. Department of Housing and Urban Development (“HUD”) implemented BAP for most non-disaster HUD programs, including those administered by KHC, but not limited to:

1. HOME Investment Partnerships Program (“HOME”),
2. National Housing Trust Fund (“NHTF”),
3. Emergency Solutions Grant (“ESG”),
4. Continuum of Care (“CoC”),
5. Housing Opportunities for Persons with AIDS (“HOPWA”),
6. Special NOFA for unsheltered and rural homeless,
7. Preservation and Reinvestment Initiative for Community Enhancement (“PRICE”).⁵

HUD may change applicable programs and requirements for BAP at any time and KHC may change this policy as may be required, from time to time, in its sole discretion.

Exemptions from BAP

The BAP does not apply to:

- Housing projects with one to four units,⁶
- Equipment, tools, and supplies brought to a construction site and removed upon completion of the project or furnishings within a completed project not permanently affixed to the property,⁷
- Expenditures made in anticipation of or as a response to an emergency or major disaster under the Stafford Act (42 U.S.C. 5122(1) and (2)) or pre or post disaster or emergency response expenditures,⁸ or
- Program income.⁹

Disaster or Emergency Response Expenditures

Federal regulations at 2 CFR 184.8 outlines exemptions to the BAP for expenditures related to major disaster or emergency responses. HUD has determined that certain CPD funds, such as CDBG-DR and HOME-ARP, are statutorily excluded from the applicability of the BAP because they are specific emergency and disaster recovery grants that are appropriated by Congress in response to an emergency or disaster.¹⁰

⁵ CPD-25-01, Section V, page 9

⁶ CPD-25-01, Section V, page 9

⁷ CPD-25-01, Section IV, page 11

⁸ 2 CFR 184.8; KHC will require specific documentation to determine this exemption may apply to a project. See Section - Disaster or Emergency Response Expenditures.

⁹ This is not explicitly listed under the Act but is defined as not being considered FFA and therefore BABA is not applicable under CPD-25-01.

¹⁰ CPD-25-01, Section IV, page 10; Public Interest Waiver of Build America, Buy America Provisions for Exigent Circumstances as Applied to Certain Recipients of HUD Federal Financial Assistance, Docket No. FR-6331-N-05, page 5, footnote 1.

2 CFR 184.8 exempts “pre- and post-disaster or emergency response expenditures” from the BAP. Pre- and post-disaster or emergency response expenditures include expenditures that are authorized by statutes other than the Stafford Act (42 USC 5121) and are made in anticipation of or response to an event that qualifies as an “emergency” or “major disaster” as those terms are defined in the Stafford Act. If a project is claiming an exemption as a pre- or post-disaster or emergency response expenditure, KHC may require the following items to document the exemption:

1. A copy of the federal disaster declaration under the Stafford Act (from FEMA or another federal authority) within the last **7 years** for the geographic area where the project will be located.
 - If the project is also receiving funds that have been appropriated by Congress in response to an emergency or disaster, such as CDBG-DR, KHC may require a copy of the firm commitment letter.
2. Proof that there is a need for housing development in the federally declared disaster area.
 - This may be a statement incorporating the Kentucky housing supply gap analysis information or data from a market study.
3. A statement on how the project will address the need for housing development in the area.
 - This may be a summary of the units to be built and/or services to be provided.
4. A statement of how a delay in housing development in response to the disaster could pose a threat to resident safety or health, community stability, or economic recovery.
 - Examples may include an explanation of the difference in market rate and affordable units, services that will be offered to support community stability and economic recovery, and a summary of the market study providing these details.

What Materials are Subject to the BAP?

The BAP applies to all iron and steel, manufactured products, and construction materials used in an infrastructure project.¹¹ The classification of the materials is based on when the item is brought to the work site for incorporation into the project.

Compliance

The compliance requirements will vary depending on the type of FFA, if the project incorporates applicable materials, and if a waiver for BAP is available.

Determination of BAP

KHC award letters will require that all potential recipients of FFA that KHC administers to:

1. Agree to include specific language into all contractor and subcontractor agreements; see “Contract Language” below; and

¹¹ 2 CFR §184.3 provides further definitions on what may be considered predominantly of iron or steel, manufactured products, and construction materials.

2. Sign and complete the Buy America Preference Applicability Checklist (Appendix A).
 - a. Steps 1-4 assess whether the BAP applies to the project, including whether any exemptions would apply. If “No” is answered for Steps 1-4, then the BAP does not apply. If “Yes” is answered for Steps 1-4, then the BAP applies.
 - For information about whether a project might qualify for an exemption from the BAP as a “pre- or post-disaster or emergency response expenditure,” see 2 CFR § 184.8 and the “Disaster or Emergency Response Expenditures” section above.
 - b. Step 5 assesses whether the BAP applies based on the obligation date of the covered CPD program funds. The obligation date is generally the date that HUD executed the grant agreement with KHC and will be determined by KHC. It is not the date when KHC commits funds to a project under a subrecipient agreement.
 - c. Steps 6-7 assess whether a HUD general waiver would apply or whether a project or product specific waiver will be sought.
 - d. Refer to “Use of HUD-Approved Waivers” below, for additional guidance on waivers.

Required Contract Language

All subgrantees, developers, contractors, subcontractors, etc. that may receive Covered Program funds from KHC must include the following language in all contracts, agreements, subawards, purchase orders, requests for proposals, and all other relevant procurement and bid documents:

“Contractor shall comply with the Build America, Buy America Act (“BABA”), enacted as part of the Infrastructure Investment and Jobs Act (IIJA), Pub. L. 117-58, and all implementing regulations, rules, and guidance, for all public infrastructure projects, as defined in 2 C.F.R. § 184.4. Contractor shall apply a domestic content procurement preference (“Buy America preference” or “BAP”) for all iron, steel, manufactured products, and construction materials incorporated into the Project, unless excepted by an applicable waiver, including such materials purchased or installed by any subcontractors, vendors, or suppliers. Contractor shall obtain and maintain records sufficient to demonstrate compliance with BABA, including supplier labels, manufacturer certifications, waiver documentation, and purchase tracking, for the longer of the applicable HUD program record retention period or five (5) years after completion of construction, and shall make such records available for review by the Project Owner, Kentucky Housing Corporation, HUD, other federal agencies, and auditors upon request. Contractor shall include the substance of this clause in all subcontracts, purchase orders, and supplier agreements of any tier and shall remain fully responsible for compliance by such parties.”

Certifications and Documentation

If the project is exempt from the BAP due to being a pre- or post-disaster emergency response expenditure, the recipient must submit a copy of the documentation outlined in the “Disaster or Emergency Response” section above.

If the BAP applies, once a project is awarded and the completed and signed BABA Applicability Checklist (Appendix A) is provided to KHC, the recipient must submit:

1. A Certification Statement signed by the recipient acknowledging BABA is applicable (see Appendix B),
2. A schedule of materials and manufactured products to be used in developing the project to include:
 - i. A detailed list of materials
 - ii. Estimated cost of materials
 - iii. BABA Category (i.e. Iron and Steel, Manufactured Products, Construction Materials Specifically Listed, Construction Materials Not Listed)
 - iv. Whether the material is BABA compliant
 - v. If the material is not BABA compliant, reason for non-compliance, and information on efforts to obtain BABA compliant replacement
(See Appendix C for sample schedule of materials and products spreadsheet)

During project underwriting and review:

1. KHC will review the current schedule of materials and manufactured products.
2. The de minimis amount calculated in the Buy America Preference Applicability Checklist (Appendix A) will be updated if there are changes between the estimated cost of materials and actual cost of materials.
 - a. If the percentage of the de minimis amount used is equal to or greater than 4%, the project analyst will contact the recipient to determine what steps are being taken to ensure BABA compliance for the remaining period of construction, or to see if the project needs to request a product-specific waiver or project-specific waiver.

At project completion and the building(s) being placed into service, the recipient must submit:

1. A self-certification (*Appendix D*)
2. A current schedule of materials and manufactured products purchased and used in developing the project. (*Appendix C*)

Recipient must maintain, or cause to be maintained, records sufficient to track all purchases of materials and manufactured products to evidence BABA compliance for a period of 5 years after construction is complete. Recipient is required to produce the supporting documentation for review by KHC, other state and federal agencies, and auditors upon request.

Acceptable documentation of BABA compliance includes, but is not limited to, manufacturer certification letters and labels similar to the following:

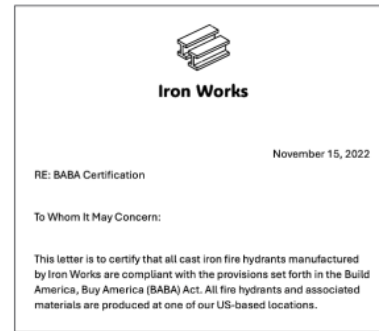
Labels:



Product details
Package Dimensions : 14.1 x 12.6 x 8.8 inches; 0.01 Ounces
Item model number : 378570000
Date First Available : November 3, 2009
Manufacturer : Bel-Art Products
ASIN : B00ZV8W7XY
Country of Origin : USA
Best Sellers Rank: #1,221,755 in Industrial & Scientific (See Top 100 in Industrial & Scientific) #37 in Lab Multichannel Pipettors

Manufacturer Certification Letters:

- Confirms that products used for the infrastructure project comply with BABA
- May include:
 - project name and location
 - contract number or project number
 - description of products and identify location of production in the USA
 - Signature affirms their knowledge of the manufacturing process for the referenced product(s) and attests that the project meet the BABA requirement



Use of Approved Waivers

In addition to project and product specific waivers (see below), HUD guidance also allows for four general applicability waivers:

1. Exigent Circumstances
2. De Minimis and Small Grants
3. Tribal Recipients
4. Pacific Island/Territory Recipients

While HUD recognizes all four waivers, only the first two waivers are applicable for use by KHC. The Tribal Recipients waiver¹² and the Pacific Island/Territory Recipients waiver¹³ are not applicable and will not be considered by KHC.

Each waiver is subject to specific eligibility criteria and documentation requirements. When a project qualifies under one of these waivers, the project file must clearly indicate:

- The applicable general waiver being utilized
- A detailed explanation of how the project meets all waiver requirements
- Supporting documentation substantiating compliance

KHC will, in its sole discretion, determine the applicability of any waiver, the amount allowed by a waiver, and all waiver compliance requirements. Failure to comply with any waiver conditions, if any, may result in revocation of the waiver and enforcement of full BABA requirements. All projects granted a waiver will be subject to KHC's periodic review of costs, expenses, project timeline, development progress, and continued need for the waiver.

¹² See Notice PIH 2024-35(Revised) for applicability of the Tribal Recipients Waiver.

¹³ See Federal Register November 21, 2023, Docket No. FR-6407-N-02.

Exigent Circumstances Waiver

In accordance with HUD's public interest waiver for exigent circumstances, KHC may allow the Exigent Circumstances Waiver for projects that are necessary to protect life, safety, or property of residents and the community, to be determined in the sole discretion of KHC. These waivers are not required to be submitted to HUD for approval; KHC can approve them at the state level. KHC will consider an Exigent Circumstances Waiver for projects that are in immediate need to be completed because of a threat to life, safety, or property of residents and the community, as KHC may determine.

Development Timeline: The project may span multiple years from award date to placement in service provided that:

- The urgency of the housing need is immediate at the time of award;
- The development timeline is reasonable and documented; and
- Interim milestones demonstrate progress toward completion.

Documentation Requirements: The recipient must provide KHC with the following:

- Description and certification that an immediate need exists and how a delay may pose a threat to life, safety, or property of residents and the community and BABA compliance would impede a timely response;
- Timeline of the development and projected placed in service date; and
- Request for an exigent circumstances waiver.

De Minimis and Small Grants Waiver

The de minimis and small grants waivers are not required to be submitted to HUD for approval; KHC can approve them at the state level.

De Minimis Waiver

This waiver is available for all HUD FFA projects and allows a project to waive BAP requirements for Covered Materials from foreign or unknown sources for a de minimis portion of the project, not to exceed 5% of the total cost of Covered Materials or \$1,000,000, whichever is less. This waiver can be used on all projects subject to BAP and should be utilized prior to seeking any other waivers. For projects utilizing this waiver, the recipient must provide a list of Covered Materials and the associated costs to which the De Minimis Waiver applies. See Appendix C for materials and costs listing.

Small Grants Waiver¹⁴

This waiver applies to projects receiving HUD FFA whose total cost is equal to or less than \$350,000.¹⁵

¹⁴ The Small Grants Waiver is scheduled to expire November 23, 2027.

¹⁵ This amount is based on the simplified acquisition threshold at 2 CFR 200.1, which is currently \$350,000.

For projects requesting a Small Grants Waiver, the recipient must provide the following:

1. Written memo by the recipient that the Small Grants Waiver applies with reference to the published Small Grants Waiver with the effective date of the waiver.

Project and Product-Specific Waivers

Project and product-specific waivers must be submitted to HUD by KHC and are available on a limited, case-by-case basis and only for the following reasons:

1. **Nonavailability:** Covered Materials are not produced in the USA in sufficient and reasonably available quantities or of a satisfactory quality.
2. **Unreasonable cost:** Inclusion of domestically produced Covered Materials will increase the cost of the overall project by more than 25 percent.
3. **Public interest:** Adhering to the BAP would be inconsistent with the public interest. Must include how the waiver will serve the public interest and demonstrate definite impacts to the community if specific items, products, or materials are not utilized.

In the event a request for a project or product-specific waiver is needed, **only KHC may submit the request to HUD**. Please note that waivers cannot be approved retroactively for items already purchased or incorporated into a project. Before KHC submits a waiver, the recipient must complete the following:

1. Market research demonstrating efforts to procure domestically. Acceptable market research documentation will be results from the National Institute of Standards and Technology Manufacturing Extension Partnership (NIST MEP) or a similar scouting service, or documentation of good faith efforts to obtain at least 3 manufacturers or suppliers center is recommended by HUD. HUD will request this information as part of the waiver submission.
2. Build America Buy America Waiver Request – Sections 7-17 only (See Appendix E, Form OMB No: 2511-0002) to KHC, which includes a certification under penalty of perjury that the information contained in the request is true and correct. Attach the necessary documentation in support of the waiver request.

KHC will review the waiver submission and if KHC considers the waiver incomplete, KHC will contact the recipient. Then, KHC will complete and submit the waiver through the HUD Waiver Submission Site. The agency will review the waiver and make it public in the Federal Register and open for public comment for a minimum of 15 days. The Office of Management and Budget's Made In America Office (MIAO) will review the waiver and public comments received and communicate a final decision to the agency. The agency and MIAO's determination of the waiver request will be provided to KHC once it is available. KHC will update the recipient on the waiver request and document the project file.

List of Appendices

- Appendix A Buy America Preference Applicability Checklist
- Appendix B BABA Compliance Certification
- Appendix C BABA Construction Materials and Manufactured Products Spreadsheet
- Appendix D BABA Compliance Certification Upon Completion
- Appendix E BABA Waiver Request to HUD