

Build America, Buy American, Act (BABA) Requirements for ARC Projects



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Procurement Purposes (pre-application consideration)

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Important!

Build America, Buy America (BABA):

The Build America, Buy America Act, enacted as part of the Infrastructure Investment and Jobs Act on November 15, 2021, established a domestic content procurement preference for all Federal financial assistance obligated for infrastructure projects after May 14, 2022. The domestic content procurement preference requires that all iron, steel, manufactured products, and construction materials used in covered infrastructure projects are produced in the United States (Buy America Preference).

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Phased Implementation

➤ BAP now applies to:

- Infrastructure - 2023 ARC Projects containing iron and steel with a costs greater than \$250K
- Will apply to specifically listed construction materials with FY2024 Appropriations

➤ BAP does **not** apply to:

- Non-infrastructure funding.
- Infrastructure projects that do not contain steel
- Infrastructure projects with a total costs of \$250K or less
- Projects qualifying under another HUD general waiver

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HUD Construction Materials Groups

HUD's waiver breaks construction materials into two groups for the purposes of HUD's phased implementation: "specifically listed" and "all other construction materials."

- **Iron & Steel** – 2023 Awards and beyond
- **Specifically Listed** – 2024 Awards
 - Metals other than iron or steel (non-ferrous metals)
 - Lumber
 - Composite building materials
 - Plastic and polymer-based pipe and tube (e.g., PVC pipe)
- **All Other Construction Materials**
 - Glass
 - Drywall
 - Other construction materials
- **Manufactured Products**
 - A material or supply used in an infrastructure project that is not iron or steel or a construction material.

BAP will apply to...	Iron and Steel	Specifically Listed Construction Materials	All Other Construction Materials	Manufactured Products
CDBG Formula Grant:	All funds obligated on or after November 15, 2022	As of the date HUD obligates new FFA from FY24 appropriations	As of the date HUD obligates new FFA from FY25 appropriations	As of the date HUD obligates new FFA from FY25 appropriations

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BABA's Impact

Pre-award considerations

- Availability of products covered by the Buy America Preference (BAP)
- Cost of products covered by the Buy America Preference (BAP)
 - Impact on PER/PAR cost estimates

Post-Award Considerations

- Documenting products county of origin
- Bid Requirements – Advertising, Instructions, Bid Forms
- Contract Requirements
 - Architect/ Engineer - obtaining and maintaining all BABA documentation (particularly manufacturers' certifications) during construction, which shall be transferred to the recipient.
 - Construction Contract Clause

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Procurement Purposes (after award)

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Build America, Buy American (BABA)

Demonstrating Compliance

- Recipients will ensure the products delivered to the construction site are accompanied by proper documentation that demonstrate compliance with the law and made available to the funding authority upon request.
- Signed certification letter from the manufacturer for the project is the most direct and effective form of compliance documentation for ensuring products used on site are BABA-compliant prior to their installation
- Basic elements of sufficient documentation:
 - Project name, project location, contract number, or project number
 - Description of product(s) (simple explanation sufficient to identify the product(s)), or an attached purchase order, invoice, or bill of lading.
 - Attestation statement referencing Infrastructure Investment and Jobs Act ("IIJA") or the Bipartisan Infrastructure Law (BIL) and American Iron and Steel (AIS) requirements
 - Manufacturing location (s)
 - Signature of representative certifying knowledge of manufacturing processes.

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Demonstrating Compliance Cont'd

- Architect/ Engineer contract should include, as a basic service, obtaining and maintaining all BABA documentation (particularly manufacturers' certifications) during construction, which shall be transferred to the recipient. The architect or engineer will need to certify to this action at the project's end.
- At a minimum, the following must be included in all construction contract documents: All requirements of the Build America, Buy America (BABA) Act, 41 USC 8301 note, and all applicable rules and notices, as may be amended, shall be complied with if applicable to the 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.
- Contractors must provide manufacturers' certifications for all BABA compliant items to the responsible party before a request for reimbursement to the agency is made.

Bid Requirements

Advertisement for Bids

- This agreement is for services related to a project that is subject to the Build America, Buy America Act (BABAA) requirements under Title IX of the Infrastructure Investment and Jobs Act ("IIJA"), Pub. L. 177-58. Absent an approved waiver, all iron, steel, manufactured products, and construction materials used in this project must be produced in the United States, as further outlined by the Office of Management and Budget's Memorandum M-22-11, Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure, April 18, 2022.

Instructions to Bidders

- Any request for substitute or "or equal" shall include the Manufacturer's Certification of compliance with the Build America, Buy America Act (BABAA) requirements mandated by Title IX of the Infrastructure Investment and Jobs Act ("IIJA"), Pub. L. 177-58. If the Instructions include a Federal requirements section, include the following: BABAA requirements apply to this project.

Bid Form

- Bidder's representation section: Bidder is familiar with all laws and regulations that may affect cost, progress, and work performance, including BABAA requirements.