

Build America, Buy America Act:
Buy America Preference
Policy - OWHLF

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Definitions

Key terms that have relevance to the interpretation and implementation of the Buy America Preference (BAP) for Community Planning Development (CPD) programs are defined in the BABA statute and may be found in [2 CFR 184](#) and Office of Management and Budget (OMB) guidance.

Build America, Buy America Act (BABA) - is found at 41 U.S.C. §§ 8301 - 8305 and includes division G, title IX, subtitle A, parts I–II, §§ 70901-70927 of the Infrastructure Investment and Jobs Act (Pub. L. No. 117-58) rules implementing BABA are found at 2 C.F.R. part 184..

Buy America Preference (BAP) - is defined in [2 CFR 184.3](#) and means the “domestic content procurement preference” set forth in [§ 70914 of BABA](#), which requires the head of each Federal agency to ensure that none of the funds made available for a Federal award for an infrastructure project may be obligated unless all of the Iron, Steel, Manufactured Products, and Construction Materials incorporated into the project are Produced in the United States.

Categorization of Articles - refers to the requirement that articles, materials, and supplies should only be classified into one of the following categories:

- i. Iron or Steel Products;
- ii. Manufactured Products;
- iii. Construction Materials; or
- iv. Section 70917(c) Materials.

An article, material, or supply should not be classified into more than one category and must be made based on the status of the article, material, or supply upon arrival to the work site for use in an Infrastructure Project. Articles, materials, or supplies must meet the BAP for only the single category in which they are classified and, in some cases, may not fall under any of the categories listed above.

Component - is defined in [2 CFR 184.3](#) and means an article, material, or supply, whether manufactured or unmanufactured, incorporated directly into: a Manufactured Product; or, where applicable, an Iron or Steel Product.

Construction Materials - is defined in [2 CFR 184.3](#) and means articles, materials, or supplies that consist of only one of the items listed in paragraph (1) of this definition, except as provided in paragraph (2) of this definition. To the extent one of the items listed in paragraph (1) contains as inputs other items listed in paragraph (1), it is nonetheless a Construction Material.

(1) The listed items are:

- i. non-ferrous metals;
- ii. plastic and polymer-based products (including polyvinyl chloride, composite building materials, and polymers used in fiber optic cables);
- iii. glass (including optic glass);
- iv. fiber optic cable (including drop cable);
- v. optical fiber;
- vi. lumber;
- vii. engineered wood; and
- viii. drywall.

(2) Minor additions of articles, materials, supplies or binding agents to a Construction Material does not change the categorization of the Construction Material.

Covered Materials - includes the following when used in connection with an Infrastructure Project:

- i. all Iron and Steel Products;
- ii. all Manufactured Products; and
- iii. all Construction Materials.

Covered CPD Programs - means any Federal Financial Assistance administered by CPD that is used for infrastructure purposes, excepting expenditures related to pre and post disaster or emergency response.

Grantee - as defined at [24 CFR 5.100](#), means the person or legal entity to which a grant is awarded and that is accountable for the use of the funds provided.

Federal Financial Assistance (FFA) - as defined at [2 CFR 200.1](#) (or successor regulations) and includes all expenditures by a Federal Agency to a NonFederal Entity for an Infrastructure Project, except that it does not include:

- i. expenditures for assistance authorized under section 402, 403, 404, 406, 408, or 502 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170a, 5170b, 5170c, 5172, 5174, or 5192) relating to a major disaster or emergency declared by the President under section 401 or 501, respectively, of such Act (42 U.S.C. 5170, 5191); or
- ii. Pre and Post Disaster or Emergency Response Expenditures.

Infrastructure - as described in [2 CFR 184.4\(c\)](#) and encompasses public Infrastructure Projects in the United States, which includes, at a minimum: the structures, facilities, and equipment for roads, highways, and bridges; public transportation; dams, ports, harbors, and other maritime facilities; intercity passenger and freight railroads; freight and intermodal facilities; airports; water systems, including drinking water and wastewater systems; electrical transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property; and structures, facilities, and equipment that generate, transport, and distribute energy including electric vehicle (EV) charging. See also [2 CFR 184.4\(d\)](#).

Infrastructure Project - as defined in [2 CFR 184.3](#), means any activity related to the construction, alteration, maintenance, or repair of infrastructure in the United States regardless of whether infrastructure is the primary purpose of the project.

Iron and Steel Products - as defined in [2 CFR 184.3](#), means an article, material, or supply that consists 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 CFR 184.3](#), means that the cost of the iron and steel content exceeds 50 percent 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.

Made in America Office (MIAO) - is the office at the Office of Management and Budget (OMB), established by section [70923 of BABA](#), that is charged with, among other things, enforcing compliance with the BAP and establishing the procedures to review waiver requests proposed by a Federal awarding agency.

Manufactured Products - as defined in [2 CFR 184.3](#), means:

- (1) articles, materials, or supplies that have been:
 - (i) processed into a specific form and shape; or
 - (ii) combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies.
- (2) if an item is classified as an Iron or Steel Product, a Construction Material, or a Section 70917(c) Material under [2 CFR 184.4\(e\)](#) and the definitions set forth in this section, then it is not a Manufactured Product. However, an article, material, or supply classified as a Manufactured Product under [2 CFR 184.4\(e\)](#) and paragraph (1) of this definition may include Components that are Construction Materials, Iron or Steel Products, or Section 70917(c) Materials.

Manufacturer - is defined in [2 CFR 184.3](#) and means the entity that performs the final manufacturing process that produces a Manufactured Product.

Non-Federal Entity - means a State, local government, Indian Tribe, Institution of Higher Education (IHE), or nonprofit organization, as provided in [2 CFR 200.1](#). Public Housing Agencies are Non-Federal Entities

Not Listed Construction Materials - refers to the category of Construction Materials that are subject to the BAP, but not included in HUD's Specifically Listed Construction Materials, as defined in the Phased Implementation Waiver which includes:

- i. plastic and polymer-based products other than composite building materials or plastic and polymer-based pipe or tube;
- ii. glass (including optic glass); and
- iii. drywall.

Obligate - means the date that HUD executed the legal instrument creating the relationship between HUD and the grantee for an award of FFA. The milestone that establishes an Obligation date depends on each program but for many CPD programs, such as HOME Investment Partnerships Program (HOME) and the Housing Trust Fund (HTF) program, the Obligation date occurs upon HUD's execution of the grant agreement.

OMB Guidance - refers to [2 CFR Part 184](#), the "Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure" (M-24-02), issued October 25, 2023, by the OMB, and any subsequent guidance to rescind or replace M-24-02. This guidance is applicable to the heads of all Federal agencies for the implementation of the BABA's BAP.

Pre and Post Disaster or Emergency Response Expenditures - the Federal funding authorized under section 402, 403, 404, 406, 408, or 502 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) relating to a major disaster or emergency declared by the President under section 401 or 501, respectively. The BAP does not apply to Pre and Post Disaster or Emergency Response expenditures authorized by statutes other than the Stafford Act and made in anticipation of or in response to an event that qualifies as an emergency or major disaster within the meaning of the Stafford Act.

Produced in the United States - is defined in [2 CFR 184.3](#) and means:

- i. in the case of Iron or Steel Products, all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States;
- ii. in the case of Manufactured Products:
 1. the product was manufactured in the United States; and
 2. the cost of Components of the Manufactured Product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all Components of the Manufactured Product, unless another standard that meets or exceeds this standard has been established under applicable law or regulation for determining the minimum amount of domestic content of the manufactured product. See [2 CFR 184.2\(a\)](#). The costs of Components of a Manufactured Product are determined according to [2 CFR 184.5](#).
- iii. in the case of construction materials, all manufacturing processes for the construction material occurred in the United States. See [2 CFR 184.6](#) for more information on the meaning of “all manufacturing processes” for specific Construction Materials.

Project - means the construction, alteration, maintenance, or repair of infrastructure in the United States.

Section 70917(c) Materials - as defined in [2 CFR 184.3](#) and means cement and cementitious materials; aggregates such as stone, sand, or gravel, or aggregate binding agents or additives. These materials are not considered Construction Materials for the purpose of BABA implementation of the BAP.

Specifically Listed Construction Materials - includes:

- i. non-ferrous metals;
- ii. lumber;
- iii. composite building materials; and
- iv. plastic and polymer-based pipe and tube.

Policy

Effective Date: 07/02/2024

Purpose

BABA was signed into law on November 15, 2021 as part of the Infrastructure Investment and Jobs Act (IIJA) as Sections 7090152 of Pub. L. No. 117-58. BABA created an incentive to increase domestic manufacturing across the country through the inclusion of BABA's "Buy America Preference" (BAP).

Compliance

As outlined in [CPD-2023-12](#), in general the BAP requires that Covered Materials used in Infrastructure Projects funded with FFA, as outlined in [Section 70914\(a\) of IIJA](#) whose total project costs exceed \$250,000 be Produced in the United States. For the purposes of the Olene Walker Housing Loan Fund program (OWHLF), the BAP requirement takes effect for FFA HOME and HTF programs Obligated on or after August 23, 2024 for Infrastructure Projects.

Does apply to

- Infrastructure Projects;
- Iron and Steel Products;
- Predominantly of Iron or Steel or a Combination of Both;
- Manufactured Products;
- Specifically Listed Construction Materials;
- Not Listed Construction Materials.

Does NOT apply to:

- Pre and Post Disaster or Emergency Response Expenditures, as outlined under [CPD-2023-12 Section 70912\(4\)\(B\)](#);
- Section 70917(c) Materials.

Waiver Process

The waiver process allows for exemption to the BAP:

General Waiver: requires no formal request to HUD if any of the documented conditions are met. These waivers include:

- Exigent Circumstances: when there is an urgent need to immediately complete an infrastructure project because of threat to life, safety, or property of residents and the community;

- Small grants and de minimis:
 - Small Grants: for all Infrastructure Projects whose total cost (from all funding sources) is equal to or less than the simplified acquisition threshold at [2 CFR 200.1](#), currently \$250,000.
 - De minimis: when the de minimis portion of an Infrastructure Project, meaning a cumulative total of five percent of the total cost of the iron, steel, manufactured products, and construction materials used in and incorporated into the infrastructure project, up to a maximum of \$1 million;
- Tribal Recipients: as determined by HUD in consultation with Tribally Designated Housing Entities and other Tribal Entities;
- Phased Implementation: to allow for orderly implementation of the BAP, the Phased Implementation Waiver establishes a schedule for the phased implementation of the BAP across CPD programs and infrastructure materials.

Project-Specific Waiver: HUD may grant a project specific waiver after consultation and review of the OMB's MIAO, which requires a public comment period of not less than 15 days.

These waivers include:

- Public Interest: when applying the BAP preference would be inconsistent with the public interest;
- Nonavailability: when types of iron, steel, 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: when the inclusion of those products and materials will increase the cost of the overall project by more than 25 percent.

Waiver requests must be submitted to OWHLF staff no less than sixty (60) days prior to the start of construction in order to be considered. Exigent circumstances may allow for an exception to this, as approved by OWHLF staff. OWHLF staff will review waiver requests for accuracy and completeness. Any missing or discrepant information will be followed up.

Application for FFA through OWHLF

When applying for FFA through OWHLF, the applicant must provide documentation that includes anticipated project details, materials sourcing and procurement, costs, as well as a documented attestation of commitment to and steps required for adhering to the BAP requirements. These documents must be provided to OWHLF staff with adequate time prior to an OWHLF board meeting. Failure to do so may result in the application not being considered before a OWHLF board meeting or may receive staff recommendation against approval.

When documentation for the BAP requirements are provided, OWHLF staff will review for accuracy and completeness. Any missing or discrepant information will be followed up. If the applicant fails to respond or provide adequate documentation, this may result in the application not being considered in an OWHLF board meeting or may receive staff recommendation against approval.

If an application is found to meet the BAP requirements, it shall be considered in accordance with all other eligible applications when brought before the OWHLF board.