



What's New with Build America, Buy America?

Some Clarification Provided, Many Questions Remain

ON NOVEMBER 2, 2023, the Department of Housing and Urban Development (HUD) released CPD Notice 2023-12, entitled “CPD Implementation Guidance for the Build America, Buy America Act’s domestic content procurement preference as part of the Infrastructure Investment and Jobs Act.” The notice provides additional guidance on the timing and requirements under the Build America, Buy America Act for covered CPD programs and activities, including but not limited to CDBG, HOME, Housing Trust Fund, and HOPWA, for example. The full CPD notice can be found at: <https://bit.ly/3SKphA9>.

On January 1, HUD also published PIH Notice 2024-01, entitled “Implementation Guidance for the Public Housing Program on Build America, Buy America (BABA).” While BABA is currently limited to the purchase of iron or steel in some HUD grant programs, like CDBG and Choice Neighborhoods implementation, its application will expand more broadly for housing authorities (HAs), becoming effective as early as February 22, 2024, for some agencies, and August 23, 2024, for most.

The notice details a variety of important topics, including:

- Implementation of BABA with ongoing projects.
- Determining the scope of an infrastructure project to determine whether existing public interest waivers apply.
- Documentation of Compliance with the Buy American Preference (BAP).
- Procurement strategies in compliance with BABA.
- Minimum due diligence search requirements.
- Safe harbor procurement strategies.

The full PIH notice can be found at: <https://bit.ly/4bWLOAZ>.

These notices, and others that HUD may publish in the future, build off the Office of Management and Budget’s (OMB) guidance published on August 23, 2023, by providing program specific guidance related to BABA implementation and requirements, including the BAP, which requires that certain goods and products funded by federal assistance be produced in the United States when funds are used for the construction, alteration, maintenance, or repair of infrastructure.

When will BABA Apply?

It is important to be aware of when BABA applies for all HUD federal funds. HUD has issued a Phased Implementation schedule and associated waiver indicating when BABA will apply to various programs (<https://bit.ly/47Ooa7a>). The Buy America Preference (BAP) takes effect for any related funds, per HUD’s table, at the time the funds are obligated by HUD (i.e., on or after). BABA does not apply to funding obligated by HUD before the related phased implementation date, which for most HUD Federal financial assistance is August 23, 2024. Agencies should review the timeline below for more details.

General Applicability Waivers Available Now

Four general applicability waivers are currently in effect for all HUD programs including: (1) Small Grants and De Minimis, (2) Exigent Circumstances, (3) Phased Implementation, and (4) Tribal Consultation.

While the Phased Implementation Waiver will expire on August 23, 2024, at which point all applicable federal financial assistance obligated will be subject to the BAP,

When Will Buy America, Build America Apply?

HUD HAS ISSUED A PHASED IMPLEMENTATION SCHEDULE AND ASSOCIATED WAIVER INDICATING WHEN BUILD AMERICA, BUY AMERICA WILL APPLY TO VARIOUS PROGRAMS AND GRANTEEES.

Program	FY23 Q1	FY23 Q2	FY23 Q3	FY23 Q4	FY24 Q1	FY24 Q2	FY24 Q3	FY24 Q4	FY25 Q1
CDBG Formula Grants	● 11/15/22 Iron and steel						FY24 Obligation Date (Varies) Construction materials – Specifically-Listed	FY25 Obligation Date (Varies) Construction materials – Not Listed Manufactured products	
Healthy Homes*		● 2/22/23 Iron and steel						● 8/23/24 All construction materials Manufactured products	
Recovery Housing Program (“RHP”) Grants				● 8/23/23 Iron and steel		FY24 Obligation Date (Varies) Construction materials – Specifically-Listed		FY25 Obligation Date (Varies) Construction materials – Not Listed Manufactured products	
All other HUD FFA**						● 2/22/24 Iron and steel		● 8/23/24 All construction materials Manufactured products	
HOME***								● 8/23/24 Iron and steel All construction materials Manufactured products	

*Choice Neighborhood, Lead Hazard Reduction, and Healthy Homes Production Grants
 **All other HUD FFA except HOME, Housing Trust Fund, and Public Housing FFA used for maintenance projects
 ***HOME, Housing Trust Fund, and Public Housing FFA used for maintenance projects

HAs will continue to be able to utilize the Small Grants and De Minimis and Exigent Circumstances Waivers.

If one of the general waivers does not apply, the Department can issue product/project specific waivers to the BAP if there is a finding that a waiver falls into one of the following three categories:

1. **Non-Availability** – when types of iron, steel, manufactured product or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality.
2. **Unreasonable Cost** – where the inclusion of those products and materials will increase the cost of the overall project by more than 25%.
3. **Public Interest** – when applying the domestic content procurement preference would be inconsistent with the public interest.

HUD has stated that project-specific waivers are available on a limited case-by-case basis, after HUD consultation and review with OMB's Made in America Office (MIAO). Further, HUD noted that waivers must be time-limited, targeted (e.g. only apply to specific categories of items, products, or materials), and conditional (e.g. with conditions that support the policies of BABA).

Agencies will be required to demonstrate that they have conducted market research and adequately considered qualified alternate items. Further, HAs will be required to describe the due diligence performed, including information, quotes, and/or responses from manufacturers, distributors, or suppliers.

Agencies should expect and plan for a minimum of six weeks for the Department to process BABA waiver applications, as the process requires HUD review, MIAO consultation and review, and a public comment period. For more information, agencies should review HUD's BABA Waiver Request form found at: <https://bit.ly/3R3ztic>.

HUD's Request for Information

The Department published a Request for Information (RFI) Regarding Iron, Steel, Construction Materials, and Manufactured Products used in Housing Programs Pursuant to BABA on February 13, 2024. HUD's RFI seeks public input on the implementation of BABA as it applies to HUD's Federal Financial Assistance (FFA) in support of the construction, alteration, maintenance, and repair of housing infrastructure projects in the United States.

According to the Department, the purpose of seeking comments is to improve HUD's understanding of the current state of the domestic market for products required in housing infrastructure projects. HUD is especially interested in comments detailing domestic materials sourcing, market readiness, other product supply considerations, and whether specific products or their components are manufactured in the United States.

The Department states that responses to the RFI will improve HUD's understanding of the current domestic market for these products to effectively implement BABA for projects funded by its housing programs. Further, to evaluate the potential need for short-term product waivers from BABA requirements if products are unavailable.

To assist agencies, PHADA has created worksheets that HAs could utilize to gather and submit information to the Department (<https://bit.ly/3OTWC96>). While the tables are not inclusive of every HUD request for information, it does narrow down some of the most critical information, which might encourage increased participation from local subject matter experts. PHADA encourages agencies to share both the full RFI, and narrowed down tables with contractors, architects, engineers, and other subject matter experts.

Conclusion

Additional resources for agencies can be found at: <https://bit.ly/3sBtqvF>. The Department states that the website is updated with frequently asked questions, fact sheets, and waiver information as it becomes available. Questions may also be sent to: buildamericabuyamerica@hud.gov.

PHADA will update members as additional information, guidance, and resources become available. The Association continues to have several concerns. Though the industry strongly supports the goals of BABA to establish and support industries in the U.S., it is concerned that applying these requirements to housing assistance and affordable housing development will increase operating and development costs, slow the progress of affordable housing development at a time of severe shortage, and reduce the number of homes that can be developed and rehabilitated with limited available funding.

PHADA will continue to urge the Department to develop guidance, and additional waivers, that provide agencies with maximum flexibility in order to reduce potential adverse impacts to programs and residents as a result of BABA. ■

What Can Agencies Do Now to Prepare for BABA?

- Immediately become familiar with the BABA applicability dates relevant to the federal funding the agency receives.
- Identify federal financial assistance funding sources and relevant projects that may be subject to the BAP.
- Review resources currently available and reach out to the relevant HUD departments with questions and concerns, particularly where BABA might potentially cause disruption to projects.
- Draft and finalize BABA language required to be included in requests for proposals and other bid contract documents funded with federal financial assistance received after applicable BABA requirement dates.