



Build America, Buy America (BABA) Webinar

October 17, 2024

Agenda and Speakers

- **Overview of BABA**

- **Malcolm Guy**, Senior Policy & Research Analyst, CLPHA

- **Strategies for BABA Compliance**

- **Howard Baum**, Deputy General Counsel, HACLA

- **HUD Resources; Simulation Exercise**

- **Robert Dalzell**, Team Leader, Office of Capital Improvements, HUD

- **Question and answer session**

BABA Overview

Malcolm Guy

Senior Policy & Research Analyst, CLPHA

Background on Build America, Buy America (BABA)

- The Infrastructure Investment and Jobs Act (IIJA) enacted in November of 2021 includes the Build America, Buy America Act (**BABA**).
- BABA established a domestic content procurement preference (“Buy American Preference” or “**BAP**”) that applies to all federal agencies and all sources of Federal Financial Assistance (“**FFA**”) (including annual appropriations) for FFA funds obligated for infrastructure projects.
- The BAP requires that all iron, steel, manufactured products, and construction materials used in infrastructure projects be produced in the United States.

Key BABA Compliance Considerations:

- Are the funds being used considered “**Federal Financial Assistance**”?
- Is the project considered an “**Infrastructure Project**”?
- Will the project use **BABA-covered materials**? (iron or steel, specifically listed construction materials, manufactured products, not-listed construction materials)
- What is the **obligation date** of the FFA you received?
- Is the project covered by any of the **general applicability waivers**?
- Is the project eligible for any of the three **project-specific waivers**?

What is considered Federal Financial Assistance?

- Federal Financial Assistance (FFA) is defined in 2 CFR 200.1 as:
 - grants; cooperative agreements; non-cash contributions or donations of property (including donated surplus property); direct appropriations; food commodities; loans; loan guarantees; interest subsidies; insurance, and other financial assistance.
 - **Capital Funds & Operating Funds are subject to BABA!**
- FFA includes all expenditures by a Federal agency to a Non-Federal Entity (like a PHA) for an Infrastructure Project.
 - FFA *does not* include expenditures used for pre- and post-disaster or emergency response assistance authorized by the Stafford Act.
- If FFA gets combined with non-FFA (i.e. state and local grants) it can subject the entire project to BABA.

What is an Infrastructure Project?

- **Infrastructure project** means any activity related to the construction, alteration, maintenance, or repair of infrastructure in the U.S. regardless of whether infrastructure is the primary purpose of the project ([2 CFR § 184.3](#))
- *Infrastructure in general* encompasses at 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.

BABA Covered Materials

- **Covered Materials** - Practically anything that would be affixed to or incorporated into “infrastructure” (buildings and real property).
 - Defined in [2 CFR 184.4\(e\)](#)
 - Not temporary (e.g. scaffolding, temp. fencing)
 - More than just plugging in (e.g. countertop microwave not subject to BABA v. microwave integrated into an over the stove rangehood is subject to BABA)
- There are several categories of Covered Materials:
 - Iron and Steel Products,
 - Manufactured Products, and
 - Construction Materials (excludes aggregates like cement, stone, sand, gravel)

Iron and Steel

- **Iron or steel products** (defined in [2 CFR 184.3](#)) and 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”* 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.

Manufactured Products

- **Manufactured Products** (defined in [2 CFR 184.3](#)) articles, materials, or supplies that have been:
 - Processed into a specific form and shape; or
 - Combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies.
- An article, material, or supply classified as a manufactured product under [§184.4\(e\)](#) and this definition may include components that are construction materials, iron/steel products, or section 70917(c) materials.
- **Manufacturer** means the entity that performs the final manufacturing process that produces a manufactured product.

Construction Materials

- **Construction materials** is defined in [2 CFR § 184.3](#) and means articles, materials, or supplies that consist of one of the following items:
 - Non-ferrous metals
 - Plastic and polymer-based products (including PVC, composite building materials, and polymers used in fiber optic cables)
 - Glass (including optic glass)
 - Fiber optic cable (including drop cable), Optical fiber
 - Lumber, Engineered wood, Drywall
- Minor additions of articles, materials, supplies, or binding agents to a construction material do not change the categorization of the construction material.

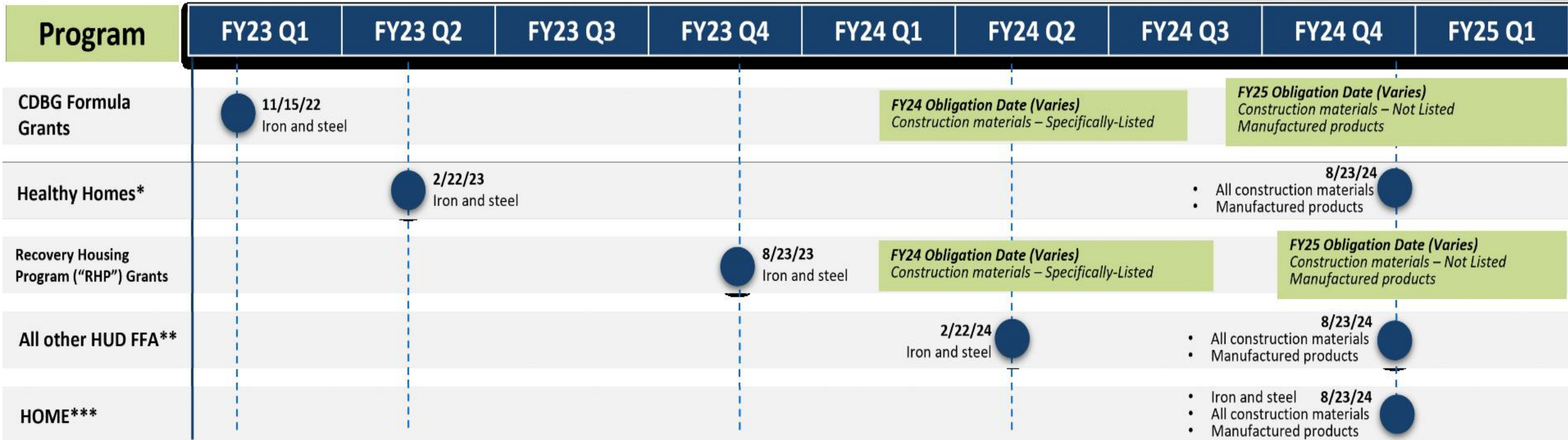
Definition of “Produced in the United States”

- **For iron or steel products:** all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the U.S.
- **For manufactured products:** both of the following...
 - a) The product was manufactured in the U.S., *and*;
 - b) The cost of the manufactured product’s components that are mined, produced, or manufactured in the U.S. is greater than 55% of the total cost of all components of the manufactured product (see [§ 184.2\(a\)](#)).
 - The costs of components of a manufactured product are determined in [§ 184.5](#)
- **For construction materials:** all manufacturing processes for the construction material occurred in the U.S.
 - See [§ 184.6](#) for the meaning of “all manufacturing processes” for specific construction materials.
- **Component** (defined in [2 CFR 184.3](#)) means an article, material, or supply, whether manufactured or unmanufactured, incorporated directly into a manufactured product; or, where applicable, an iron or steel product.

BAP Applicability and Obligation Date

- BAP applicability tied to obligation date, *NOT* when PHA spends funds.
- The term “**obligate**” means the date that HUD executed the legal instrument creating the relationship between HUD and the grantee for an award of FFA.
- In other words, funds received *before* the BABA trigger dates but spent under contracts *after* these dates are not subject to BABA.
 - *However*, if you need to add BAP-subject funds to an existing procurement, subgrant, cooperative agreement, or inter-agency agreement that was not originally subject to the BAP, contact HUD (the project becomes subject)

BAP Applicability Timeline



*FY24 Obligation Date (Varies)
Construction materials – Specifically-Listed*

*FY25 Obligation Date (Varies)
Construction materials – Not Listed
Manufactured products*

- All construction materials
- Manufactured products

*FY24 Obligation Date (Varies)
Construction materials – Specifically-Listed*

*FY25 Obligation Date (Varies)
Construction materials – Not Listed
Manufactured products*

- All construction materials
- Manufactured products

- 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

Current Situation

- **New obligations of Public Housing Capital Funds and Operating Funds by HUD will be subject to BABA (begins October 2024)**
- Several upcoming grants will be covered by the Exigent Circumstances Waiver and exempt from BABA:
 - Lead-Based Paint, Health-Related Hazards grants
 - Emergency / Natural Disaster Grants
 - Emergency Safety and Security Grant (ESSG)
 - Troubled and At-Risk Grants
- FFA also includes sub-awards, including all contracts and purchase orders for work or products under an award, and cost-reimbursement contracts.

Types of General Waivers (no need to request)

- **Exigent Circumstances** - applies when there is an urgent need by a grantee to immediately complete an infrastructure project because of a threat to life, safety, or property of residents & the community.
- **Small Grants** – infrastructure projects whose total cost is equal to or less than the current Simplified Acquisition Threshold (\$250,000)
- **De Minimis** - a cumulative total of no more than 5% of the total cost of the iron, steel, manufactured products, and construction materials, up to a maximum of \$1 million.
- These general waivers are effective through Nov. 2027 unless extended by HUD.

Types of Project Specific Waivers (must request)

- **Public Interest Waiver** - granted if requiring the use of the American made product would be inconsistent with the public interest.
 - Explain how waiving the BAP for the project/product serves the public interest
 - Demonstrate definite impacts on the community if specific items, products, or materials are not utilized in an infrastructure project.
- **Non-Availability Waiver** - granted if the product needed is not produced in the U.S. in sufficient quantities / of a satisfactory quality
 - Demonstrate you've conducted market research & considered alternate items
 - Describe due diligence performed (information, quotes, and/or responses from manufacturers, distributors, or suppliers). See [PIH Notice 2024-01](#) for specific requirements
- **Unreasonable Cost Waiver** - granted if inclusion of the U.S.-produced product will increase the cost of the overall project by more than 25%
 - Demonstrate that BABA compliance increases total project cost by more than 25%. (not just materials cost)

Process to request a Project-Specific Waiver

How requesting a waiver from HUD will work:

1. PHA completes due diligence activities (i.e. demonstrate 25% cost increase, nonavailability of BABA-compliant materials/bids, or demonstrate applying BAP is inconsistent with public interest).

[This training video](#) shows how to submit a waiver. Review the [waiver application questions here](#).

Direct recipients of HUD FFA are strongly encouraged to coordinate with their subgrantee(s) or subcontractor(s) to collect necessary information for a waiver application using [this PDF form](#).

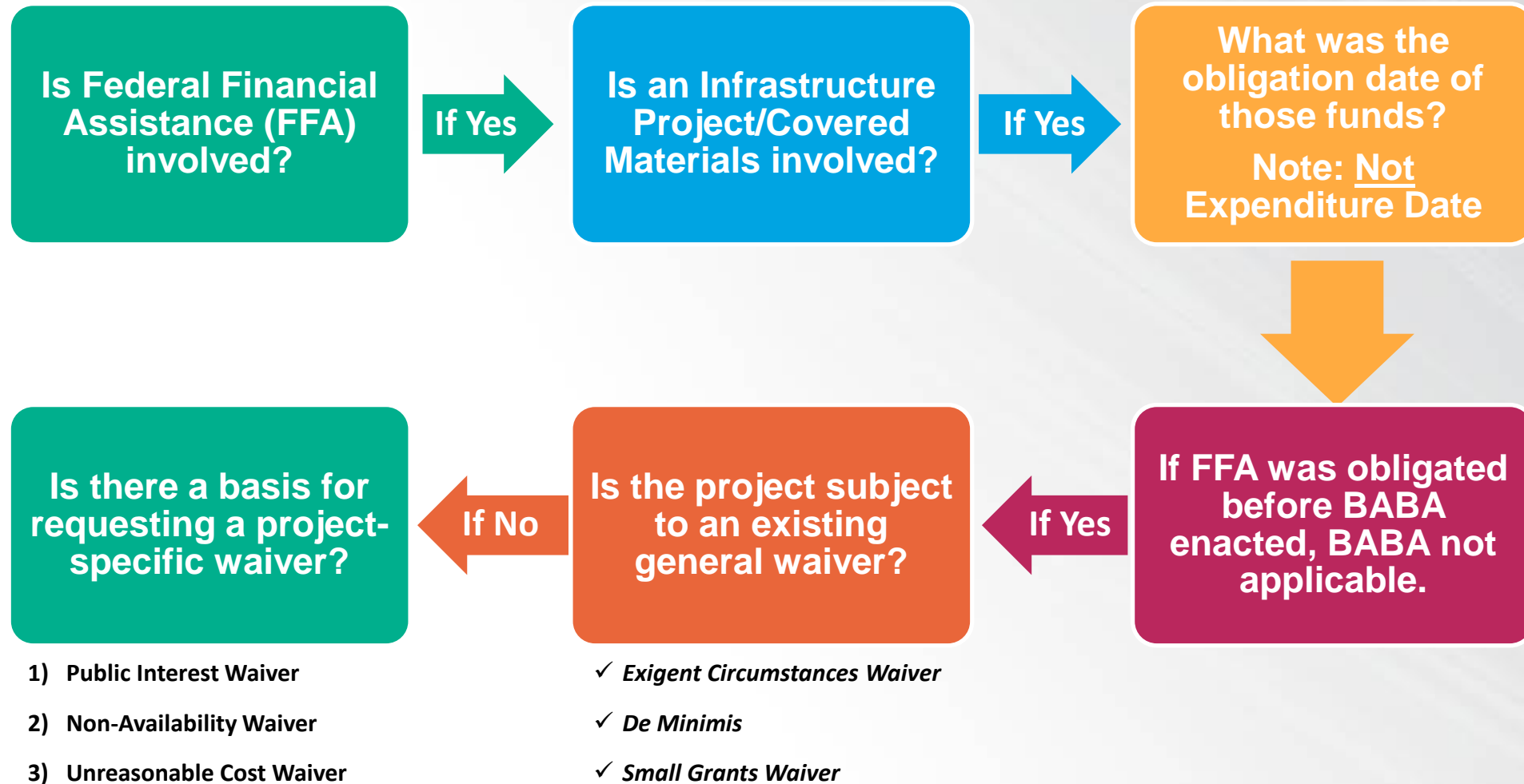
2. Submit waiver application with all necessary info to the [BABA Waiver Submission Site](#).

Public comment period of 15-30 days depending on substance.

3. PHA Waits for Response. PHA will provide additional info as requested by HUD during the review process to proceed with public comment in the Federal Register, and final approval by the Made In America Office.

4. If approved, the waiver is posted on [MadeInAmerica.gov](#)

BABA Compliance Analysis



BABA Compliance Strategies

Howard Baum
Deputy General Counsel, HACLA

Strategies for BABA Compliance (Short Term)

- **4th Quarter Operating Subsidies**
 - If less than \$250K, BABA compliance not triggered.
 - If greater than \$250K, use for salaries and other non-maintenance/construction activities.
- **Spend previously awarded Capital and Operating Funds first**
 - Remember: Funds received *before* Aug. 23, 2024, but spent *after* this date are not subject to BABA.
- **Avoid commingling of funds where possible**
 - Combining new funds with older ones can subject the entire contract/project to BABA
 - Note: There is a HUD precedent for granting project-specific waivers but they must be requested.
- **Be sure to track receipt and expenditure of new and old Capital funds and Operating funds (before and after Aug. 23, 2024)**
 - Other grants too

Strategies for BABA Compliance (Long Term)

- **Begins with review of [PIH Notice 2024-01](#) (BABA Implementation Guide)**
 - Clarifies scope of coverage and definition of an “infrastructure project”
 - **Requires incorporating required BABA compliance language into new contracts, solicitations and other agreements where BABA applies**
 - See [2 CFR 200.322](#) (Domestic preferences for procurements) that must be included in all contracts
 - See Appendix for additional suggested template language
 - Include BABA Compliance Certification in all contracts and solicitations (see [optional CPD form](#))
 - Note: Must be modified for use with Covered Materials sellers (i.e. “products sold to PHA are BABA compliant”)
 - Amend or replace existing Covered Materials supply contracts to comply with BABA
 - Review existing “as-needed” maintenance and construction contracts to determine if amendment/replacement required
 - **Provides Safe Harbor strategies for compliance**
 - **Clarifies waiver requests “due diligence” requirements**
 - Can only seek a product waiver after conducting a due diligence search.
 - Due diligence differs for Micro-Purchases, Small Purchases (\$250K) or Above
 - Provides guidance on **product certification requirements** (Notice Error: [Reseller certification is always acceptable](#) –aligns with HUD BABA FAQ)
 - Provides BABA-compliant contracting provision (not sufficient)
 - Provides guidance on record keeping requirements

Safe Harbor Strategies for Compliance (PIH Notice 2024-01)

- 1) Allows PHAs to research and designate BABA-compliant products into procurements without running afoul of Part 200. HUD has stated this is not unduly restricting competition as delineated in 2 CFR 200.319(b)(6).
- 2) Allows PHAs to rely on Architectural/Engineering providers to draft specifications used in procurements of contractors to conduct the BABA availability search and include such products in the solicitation.
- 3) **Can require bidders responding to solicitations to provide alternative responses depending upon whether they are successful in sourcing BABA-compliant materials. If none of their responses are BABA compliant or those that are BABA compliant involve a bid 25% higher than the non-BABA compliant proposal that would serve as a basis to seek a waiver.**
 - Bidder must state unable to locate BABA compliant products - Non-Availability Based Project Specific Waiver
 - Excessive compliance costs if can meet more than 25% increase - Unreasonable Cost Based Project Specific Waiver

Observations (General Waivers)

No need to apply for these, just document meet requirements and retain for three years.

- **Exigent Circumstances** – only applies when there is an urgent need due to threat to life, safety, or property. These are generally unforeseen circumstances/emergencies and seem very limited, but do include the remediation of defects impacting housing quality standards.*
- **Small Grants** – infrastructure projects whose total cost is equal to or less than the current Simplified Acquisition Threshold (\$250,000). Includes labor costs, not just materials.
- **De Minimis** - a cumulative total of no more than 5% of the total cost of the iron, steel, manufactured products, and construction materials, up to a maximum of \$1 million. Think small/minor items, misc. parts, materials, components.

*See 6331-N-05 BABA Exigent Circumstances Waiver; NSPIRE standards now?

Observations (Project Specific Waivers)

Non-Availability Waiver: Likely to use most frequently

- Non-availability includes products not being available in reasonable amount of time and desired quantity
- Labeling and certification challenges, particularly for Manufactured Products
- Can demonstrate with solicitations but must plan on much longer lead times due to waiver requests

Unreasonable Cost Waiver: Granted if inclusion of the U.S. produced product will increase the cost of the overall project by more than 25%

- Unlikely to be helpful because not just materials costs used in calculation
 - Example: \$2,000,000 Project would have to see overall cost increase in excess of \$2,500,000 (additional 25%). If materials are \$800,000 of total, and rise by 50% (\$400K), still won't satisfy because total Project cost only rises to \$2,400,000.

Numerous waivers requests are the key to securing additional BABA exemptions consideration

PHA Action Items/Next Steps

Update Procurement Policy to recognize required BABA compliance

Update Contract Templates (maintenance and construction) to include required BABA Language

- ✓ See PIH Notice for BABA provision
- ✓ See Appendix for comprehensive BABA compliance language
- ✓ See 2 CFR 200.322 (Domestic preferences for procurements)
- ✓ Include and require Certificates of BABA Compliance

Update Solicitations Templates (maintenance and construction) to include BABA compliance, as applicable

- Include ability to bid with both BABA-compliant and non-compliant proposals (for non-availability and excessive cost project specific waivers)

Update procurement procedures and contracting protocols to recognize BABA-compliance including need to track funding sources, date of awards, general and specific waivers granted

Conduct Staff and Vendor Trainings on BABA

Discuss with Finance/Accounting team to ensure proper tracking of grant awards

Start conversations with suppliers/contractors

Solicit new contracts where required

Appendix

- Sample BABA Contracting Provisions
- Draft BABA Certification Form (Zoom attachment)
- Additional resources from HUD (see slide 34)

Sample BABA Contracting Provisions (Part 1 of 5)

I. BUILD AMERICA, BUY AMERICA COMPLIANCE

Contractor acknowledges that the Project is subject to the Build America, Buy America Act (“BABA”), enacted as part of the Infrastructure Investment and Jobs Act (IIJA), Pub. L. 117-58, and Contractor agrees to comply with BABA. Pursuant to BABA, Contractor is required to apply a domestic content procurement preference (the “Buy America preference” or “BAP”) for all iron, steel, manufactured products, and construction materials incorporated into the Project. All iron, steel, manufactured products and construction materials incorporated into the Project must be produced in the United States, including such materials installed by any subcontractors or suppliers. Definitions of iron, steel, manufactured products, and construction materials can be found in 2 C.F.R. Part 184 and are incorporated herein by this reference. Additional information regarding BABA requirements and compliance may be found at https://www.hud.gov/program_offices/general_counsel/build_america_buy_america and is incorporated herein by this reference.

Sample BABA Contracting Provisions (Part 2 of 5)

A. Opinions and Estimates

- All opinions and estimates relating to costs or expenses prepared or provided by Contractor relating to the Project shall incorporate, be consistent with, and reflect compliance with BABA requirements.

B. Confirmation of Compliance

- From the date of this Agreement until three (3) years after the Project is completed, Contractor must obtain and maintain records sufficient to:
 - (1) track all product purchases relating to the Project in sufficient detail to identify the source of the funding for the purchase; and
 - (2) demonstrate compliance with BABA as follows:
 - (i) for products purchased in compliance with the BAP, obtaining and maintaining documentation that the product complied with BAP requirements; and
 - (ii) for products purchased pursuant to a waiver or other exemption from the BAP, obtaining and maintaining adequate information to validate that the purchase was covered by a waiver or other exemption.

Sample BABA Contracting Provisions (Part 3 of 5)

- For all iron, steel, manufactured products, and construction materials incorporated into the Project, Contractor shall, upon receipt of the same, obtain confirmation that the product or material was purchased in compliance with the BAP. Such confirmation must take one or more of the following forms:
 - (1) A certificate from the manufacturer or reseller stating that the product complies with BABA;
 - (2) For products that cost less than \$100 per product, a copy of a label that indicates the product was made in the United States; or
 - (3) (3) For small purchases of product that are less than the Simplified Acquisition Threshold (see 2 CFR 200.320(a)(2), as may be adjusted from time to time, either a copy of a product specification that provides sufficient detail to conclude that the product complies with the BAP or a certification from a manufacturer or reseller of a product that confirms that the product is BABA compliant.

Sample BABA Contracting Provisions (Part 4 of 5)

C. Recordkeeping Requirements and Examination Rights

- Contractor must keep and maintain all records it is required to obtain pursuant to this section for a minimum of three (3) years from the date the Project is completed. PHA shall have access to and the right to examine, at any time and at its sole discretion, any of Contractor's books, documents, papers, or other records relating to the Project including without limitation, products used, from the date of this Agreement until three (3) years from the date the Project is completed.

D. Termination for Failure to Comply

- If at any time Contractor fails to comply with the BAP, BABA, or the terms of this section, Contractor shall notify PHA immediately. Any such failure shall constitute a material breach of this Agreement and shall constitute good cause for PHA to terminate this Agreement at its sole discretion, following any applicable cure period.

Sample BABA Contracting Provisions (Part 5 of 5)

E. Indemnification by Contractor

- Contractor shall hold defend, indemnify, and hold harmless PHA and its officers, employees, commissioners, servants, agents, successors, assigns, instrumentality entities, subsidiaries and related non-profit corporations, as well as the directors, officers, employees, commissioners, servants, agents, successors, and assigns of PHA's instrumentality entities, subsidiaries, and related non-profit corporations (collectively, "Indemnified Parties") from and against all claims, actions, lawsuits, complaints, demands, damages, liabilities, losses, obligations, taxes, settlements, judgments, audit expenses and costs, regulatory proceedings, costs, or expenses (including without limitation reasonable attorneys' fees and costs), whether or not involving a third-party claim, which arise out of, relate to, or result from any failure of Contractor or its subcontractors and suppliers to comply with the BAP, BABA, or this section.

F. Survival

- The terms of this section shall survive the expiration or termination of this Agreement.

HUD's BABA Resources

Robert Dalzell

Team Leader, Office of Capital Improvements, HUD

Resources

Resources:

- [BABA FAQs - HUD Exchange](#)
- [Build America, Buy America \(BABA\) | HUD.gov](#)
- [Grantee User Manual](#) (last updated in February 2024)
- [CPD's BABA Quick Guide](#)

Implementation Notices (by Program):

- [PIH Notice 2024-01](#)
- [CPD Notice 2023-12](#)
- [PGI Notice 2024-01](#)

BABA Published Waivers on HUD's Site:

- [Office of Management and Budget \(OMB\) M-24-02](#)
- [BABA Waiver Application Form \(hud.gov\)](#)

Question & Answer Session

Use the Q&A feature in Zoom!