WEBINAR

Build America, Buy America Act (BABA)

Buy America Preference (BAP) for HOME Participating Jurisdictions and HTF Grantees

Presenter

- Clint Whited, Enterprise Community Partners

Objectives

- Provide an overview of the “Buy America Preference” (BAP) requirement of the Build America, Buy America Act (BABA) as it applies to the HOME Investment Partnerships Program (HOME) and Housing Trust Fund (HTF)
- Cover practical steps participating jurisdictions (PJs) and grantees should take to implement the BAP

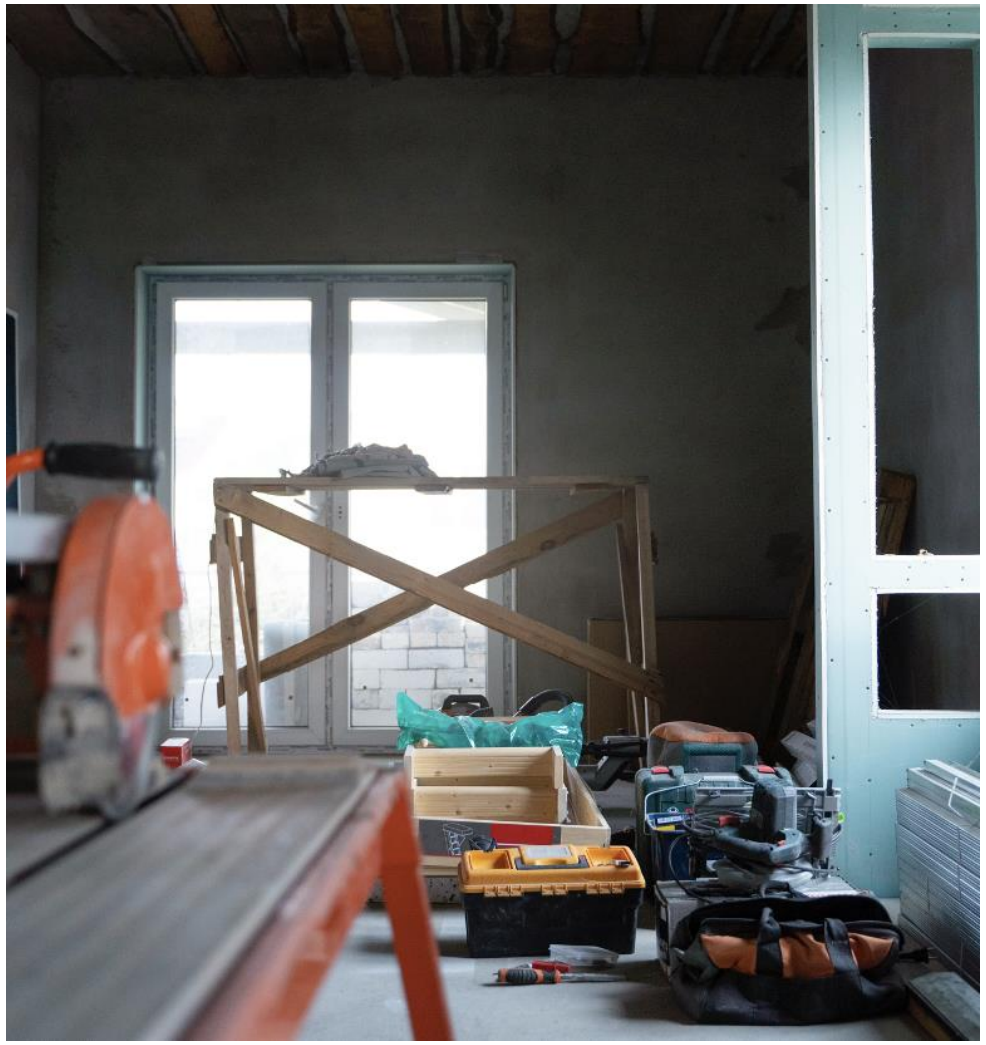


Agenda

- What is BABA?
- Projects and Products Covered by the BAP
- Project Planning
- Project Implementation and Recordkeeping
- Project Examples
- Key Takeaways

What Is the Build America, Buy America Act (BABA)?

- Requires that iron, steel, construction materials and manufactured products used in public infrastructure projects be produced in the United States
- Buy America Preference (BAP)
  - Requirement established by BABA
  - Applicable to all Federal public infrastructure spending



How Is a “Project” Defined?

- Both HOME and HTF have a regulatory definition of “project” that should be used when determining BAP applicability.
- A site or sites together with any building or buildings located on the site(s) that are under common ownership, management, and financing, and are to be assisted with HOME or HTF funds as a single undertaking. The project includes all the activities associated with the site and building.
  - See 24 CFR 92.2 for HOME and 24 CFR 93.2 for HTF

What Is “Private” Infrastructure?

- A project consisting solely of the purchase, construction, or improvement of private single-family homes for personal use
- Single-family is a 1-4 unit residence, condominium unit, cooperative unit, combination of manufactured housing and lot, or manufactured housing lot

What Projects and Products Are Covered by the BAP?

What Projects Are Covered?

For the purposes of the BAP, a public infrastructure project is defined broadly as any project that includes:

- Construction
- Alteration
- Maintenance
- Repair

Even if the primary purpose of the project is not "infrastructure"



HOME/HTF Projects Subject to the BAP

- Construction or rehabilitation of affordable multifamily housing buildings with 5 or more units
- Acquisition of vacant land or demolition undertaken for a project that will provide 5 or more affordable housing **units** and meets the requirement for a specific local project
- **Important note: BABA applies to an entire project.**
  - If any HOME/HTF funding is added to a project, the entire project is subject to BABA, regardless of what specific costs the HOME/HTF funding is supporting.

HOME/HTF Projects NOT Subject to the BAP

- Any single-family housing project. As defined in the HOME and HTF regulations, this includes:
  - HOME small-scale housing
    - Rental of no more than 4 units
    - Homeownership with no more than 3 rental units on the same site
- HOME or HTF single-family scattered-site housing (any number of units)
- HOME or HTF single-family subdivision (any number of units)
- HOME or HTF acquisition of affordable housing if no construction or rehabilitation is involved
- HOME CHDO operating expenses and capacity building
- HOME Tenant-based rental assistance

What Products Are Covered?

The following products used in covered public infrastructure projects must be produced in the United States:

- Iron and Steel
- Construction Materials
- Manufactured Products

Each product used in a project should be classified in only ONE of these categories.



Determining BABA Compliance for Covered Materials

- Iron and steel
  - All manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States
- Manufactured products
  - The product was manufactured in the United States **AND**
  - The cost of the 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.
- Construction materials
  - All manufacturing processes for the construction material occurred in the United States

Applicability Exceptions

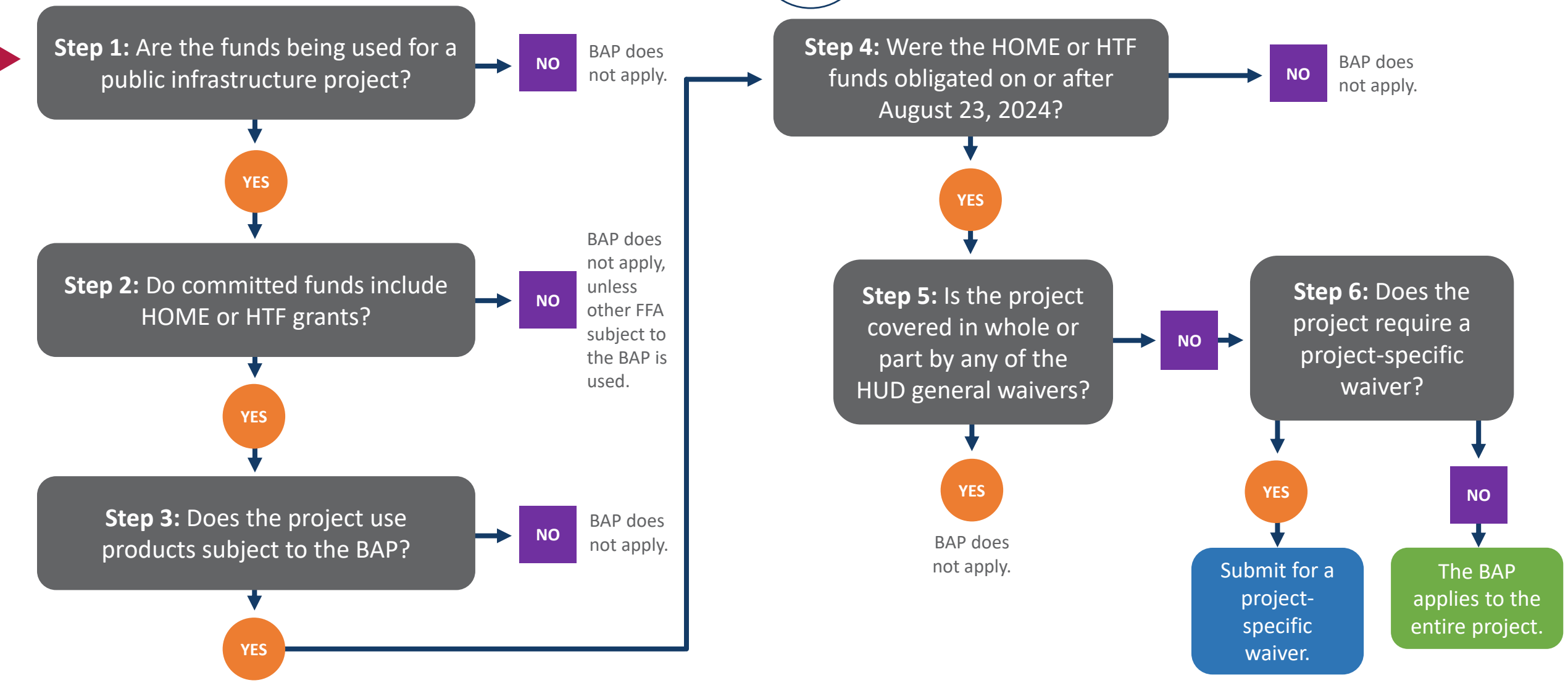
- CPD Notice 25-01 clarifies that any projects funded using only HOME-ARP are not subject to the BAP.
- The BAP does not apply to funds for pre- or post-disaster or emergency response.
- Additionally, if any HOME or HTF funding is used to respond to a presidentially declared disaster, that project can also be exempted from BABA.
  - If using this exemption, PJs and grantees must document that the project is being completed in a disaster declaration area, and a justification of how the project specifically responds to that disaster.

Project Planning

BAP Determination Overview

Possible outcomes of the BAP determination process:

- Comply with the BAP
- Utilize one of HUD's general waivers
- Obtain a project-specific waiver to exclude the project (or a portion of the project) from the BAP
- The BAP does not apply because the project does not meet the definition of a public infrastructure project


Step 1: Are the funds being used for a public infrastructure project?
NO
BAP does not apply.
YES
Step 2: Do committed funds include HOME or HTF grants?
NO
BAP does not apply, unless other FFA subject to the BAP is used.
YES
Step 3: Does the project use products subject to the BAP?
NO
BAP does not apply.
YES
Step 4: Were the HOME or HTF funds obligated on or after August 23, 2024?
NO
BAP does not apply.
YES
Step 5: Is the project covered in whole or part by any of the HUD general waivers?
NO
YES
BAP does not apply.
Step 6: Does the project require a project-specific waiver?
YES
Submit for a project-specific waiver.
NO
The BAP applies to the entire project.

Step 1: Are the funds being used for a public infrastructure project?

YES

If yes: Continue to Step 2

NO

If no: The BAP does not apply. The BAP only applies to public infrastructure projects.

Examples of HOME and HTF projects that are considered public infrastructure projects under BABA include:

- Construction or rehabilitation of affordable multifamily housing with 5 or more units
  - Keep in mind the BAP will apply to an entire project, even if HOME or HTF funding is only used for soft costs.

Step 2: Do committed funds include HOME or HTF grants?

Review the entire project budget

YES

If yes: Continue to Step 3

NO

If no: The BAP does not apply to this project due to the inclusion of HOME or HTF funds. However, the PJ/grantee must consider if the BAP would apply due to the inclusion of other Federal funding.

Note: Many HOME and HTF funds are used in LIHTC projects. The use of tax credits does not trigger BAP applicability, but other Federal funding sources might. Be sure to check with the awarding agency.

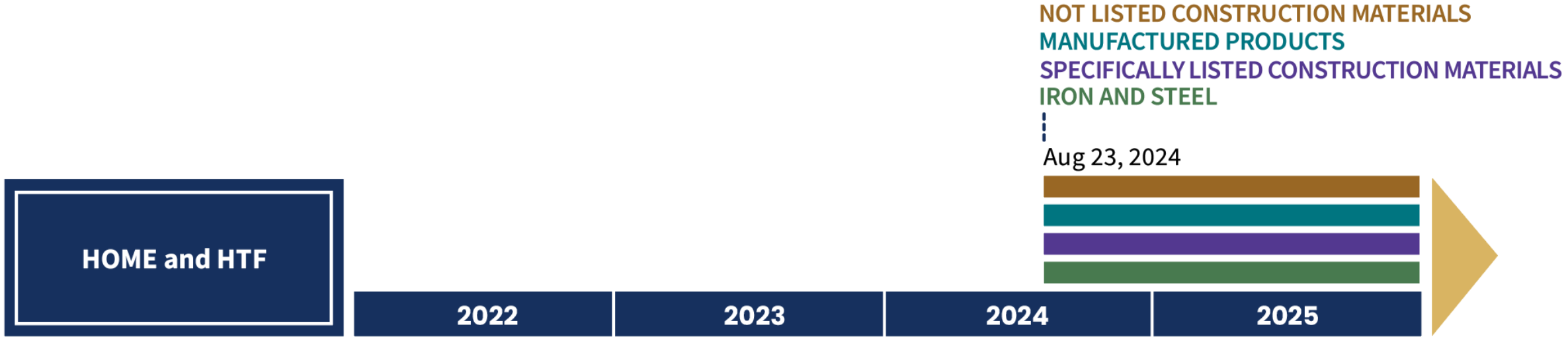
Step 3: Does the project use products subject to the BAP?

Identify and classify the products that will be used in the public infrastructure project. Will the project incorporate iron or steel, construction materials, or manufactured products?

YES If yes: Continue to Step 4

NO If no: The BAP does not apply.

Step 4: Were the HOME or HTF funds obligated on or after August 23, 2024?



YES If yes: Continue to Step 5

NO If no: The BAP does not apply.

Step 5: Is the project covered in whole or part by any of the HUD general waivers?

1. Small Grants:

- Is the total cost of the project from all sources $350,000 or less OR is the funding sourced from a small grant from HUD that is $350,000 or less?

YES

If yes: The small grants waiver applies, and the BAP does not apply to the project. Document the use of the waiver in the project file.

NO

If no to waivers 1 thru 4: Continue to Step 6

Step 5: Is the project covered in whole or part by any of the HUD general waivers?

2. Exigent Circumstances:

- Is there an urgent need to complete the project because of a threat to life, safety, or property?

YES If yes: The Exigent Circumstances waiver applies, and the BAP is not required for the project. Document use of the waiver in the project file.

NO If no to waivers 1 thru 4: Continue to Step 6

Step 5: Is the project covered in whole or part by any of the HUD general waivers?

3. Tribal Recipients:

- Is the project being carried out through a subaward of $2.5 million or less to a Tribal subrecipient?

YES If yes: The Tribal Recipients waiver applies, and the BAP is not required for the project.

NO If no to waivers 1 thru 4: Continue to Step 6

Step 5: Is the project covered in whole or part by any of the HUD general waivers?

4. Pacific Island/Territory Recipients:

- Is the recipient American Samoa, the Commonwealth of the Northern Mariana Islands, or Guam?

YES — If yes: The Pacific Island/Territory Communities Recipients waiver applies, and the BAP is not required for the project.

NO — If no to waivers 1 thru 4: Continue to Step 6

Step 5: Is the project covered in whole or part by any of the HUD general waivers?

5. De Minimis Waiver

- If none of the other general waivers apply to a project, the de minimis waiver gives additional flexibility to waive the BAP for a portion of a project.
- The de minimis waiver allows PJs and grantees to waive the BAP for materials whose total cost is no more than 5% of all materials used in a project (up to a maximum of $1,000,000).
- The total cost of materials includes all iron and steel, construction materials, and manufactured products, regardless of where the project falls in HUD's phased implementation.

Using the De Minimis Waiver

- Example Calculation:
  - $500,000 (total cost of materials) x 5% = $25,000 *De Minimis* limit
- The PJ or grantee may apply the de minimis limit to one large-value item (e.g., an HVAC system) or multiple smaller value items (e.g., toilets and sinks).
- The BAP will still apply to the rest of the materials used in the project.
- PJs or grantees may also choose to set aside some of the de minimis limit for change orders that occur later in project development.

Step 6: Does the project require a project-specific waiver?

PJs or grantees may request a project-specific waiver in the following three categories: public interest, nonavailability of materials, or unreasonable cost.

- Project-specific waivers should be requested on a limited, case-by-case basis after all other efforts to comply with the BAP have been exhausted.
- All project-specific waiver requests must be reviewed by the Made in America Office at the Office of Management and Budget before waivers can be issued.
- Plan ahead! Project-specific waivers can take several months to be approved.

Step 6: Does the project require a project-specific waiver?

- **Nonavailability Waiver:** The product you need is not produced in the United States in sufficient quantities or of a satisfactory quality (i.e., no BABA-compliant product is available)
- **Unreasonable Cost Waiver:** The inclusion of the BABA-compliant products will increase the cost of the overall project by more than 25 percent
- **Public Interest Waiver:** Complying with BABA would be inconsistent with the public interest

YES If yes: A project-specific waiver may be considered.

NO If no: The BAP applies to the project. ✅

Market Research

- CPD Notice 25-01 requires PJs and grantees to either:
  - Document a good faith effort to contact at least (3) manufacturers to determine if a BABA-compliant product is available.
  - Document the results of supplier scouting services provided by your State's NIST MEP center, or a similar national supplier scouting service.
- Tips for Submission
  - Provide clear technical specifications for the type of product you need.
    - For example, don't just say "a toilet." Say "a 1.28gpf, 2-piece, tank-style toilet that is WaterSense certified."
  - Provide all required information in the waiver submission form, including cost, quantity, and country of origin of the products you are seeking to purchase.
  - Upload supporting documentation that clearly shows communications with manufacturers or supplier scouting services and the outcome of the research.

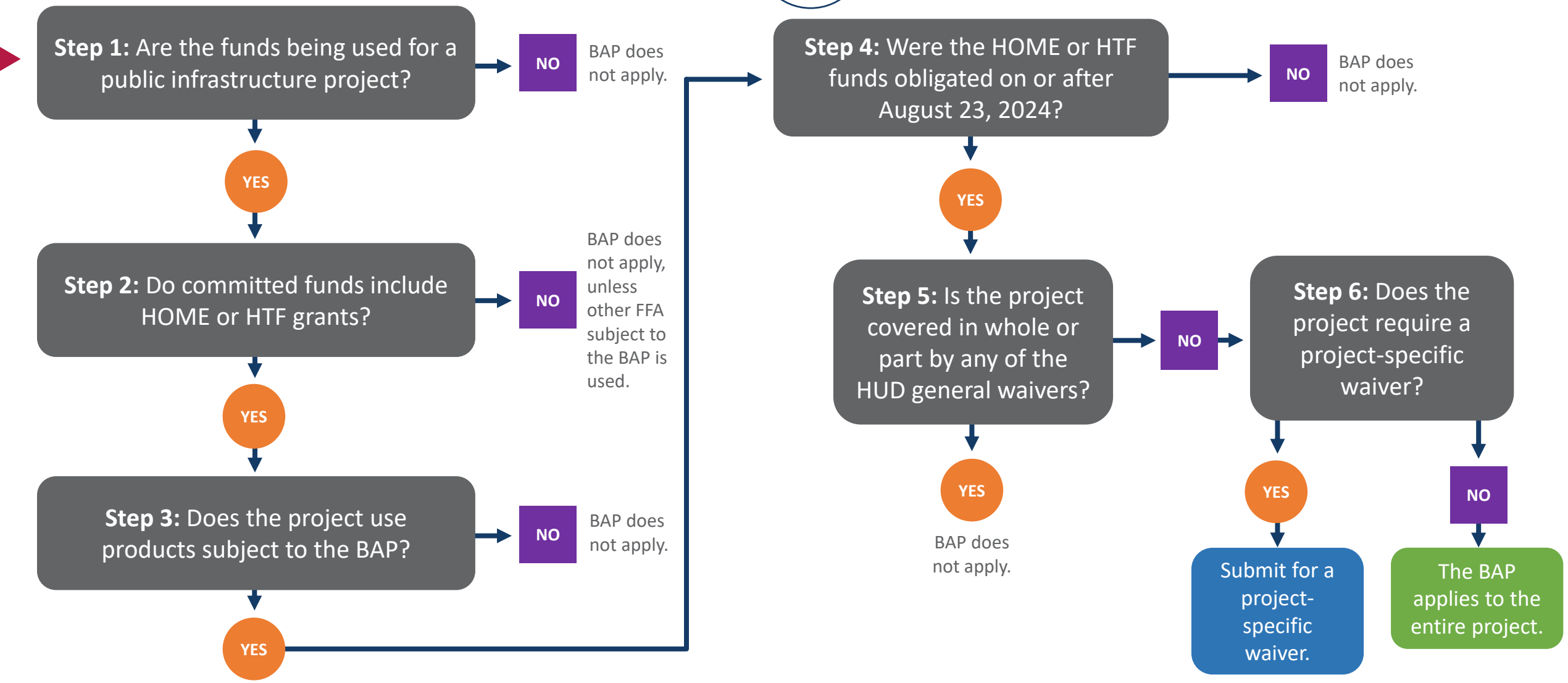
Step 6: Does the project require a project-specific waiver?

YES

If yes: A project-specific waiver may be submitted.

HUD's BABA waiver process is as follows:

1. Contact CPDBABA@hud.gov for technical assistance as needed.
2. Complete market research to confirm that no BABA-compliant product that meets the technical specifications of the project is available.
3. Submit a waiver application to HUD at https://babawaiver.hud.gov/s/ ensuring that all required information is provided.
4. Provide additional information as requested by HUD during the review process, if needed. HUD may ask you to conduct additional market research.
5. HUD will coordinate MIAO review of waivers and posting for the required 15-day public comment period.
6. HUD will notify you if your waiver has been approved by MIAO.


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Project Implementation and Recordkeeping

Procurement and Subrecipient Compliance

- Review existing procurement policies and procedures and ensure BAP compliance is incorporated.
- Ensure all subawards, contracts, purchase orders, RFPs, etc. include language regarding BABA compliance.
  - Sample language available in CPD Notice 25-01
- Consider using a certification form for compliance documentation. See example in Appendix 3 of CPD Notice 25-01.



Recordkeeping

- CPD Notice 25-01 requires the following documentation of BAP compliance:
  - Documentation of the determination of BAP applicability to the Covered Materials used in the public infrastructure project. Even if the project is determined to be exempt, documentation of that determination should be retained in the grant files to support the determination.
  - If a project is subject to the BAP, documentation that all Covered Materials subject to the BAP were procured from BABA-compliant sources, as determined by HUD's Phased Implementation Waiver.
  - If a general waiver was applied to the project, documentation that supports that the project meets the conditions of the waiver.
  - If a project-/product-specific waiver was obtained for the project, a copy of the approved waiver and market research supporting the need for the waiver.
- The notice includes a non-exhaustive list of examples of acceptable documentation, which may vary by project and product type.

Project Examples

Examples - Does the BAP Apply?

In October 2024, a participating jurisdiction commits $2 million in FY2024 HOME funds to the construction of a multi-unit residential housing project.

Does the BAP apply to this project?



Examples - Does the BAP Apply?

- ✓ The project is an infrastructure project
- ✓ The grant funds were obligated by HUD after August 23, 2024
- ✓ The project's total HOME commitment is $2 million

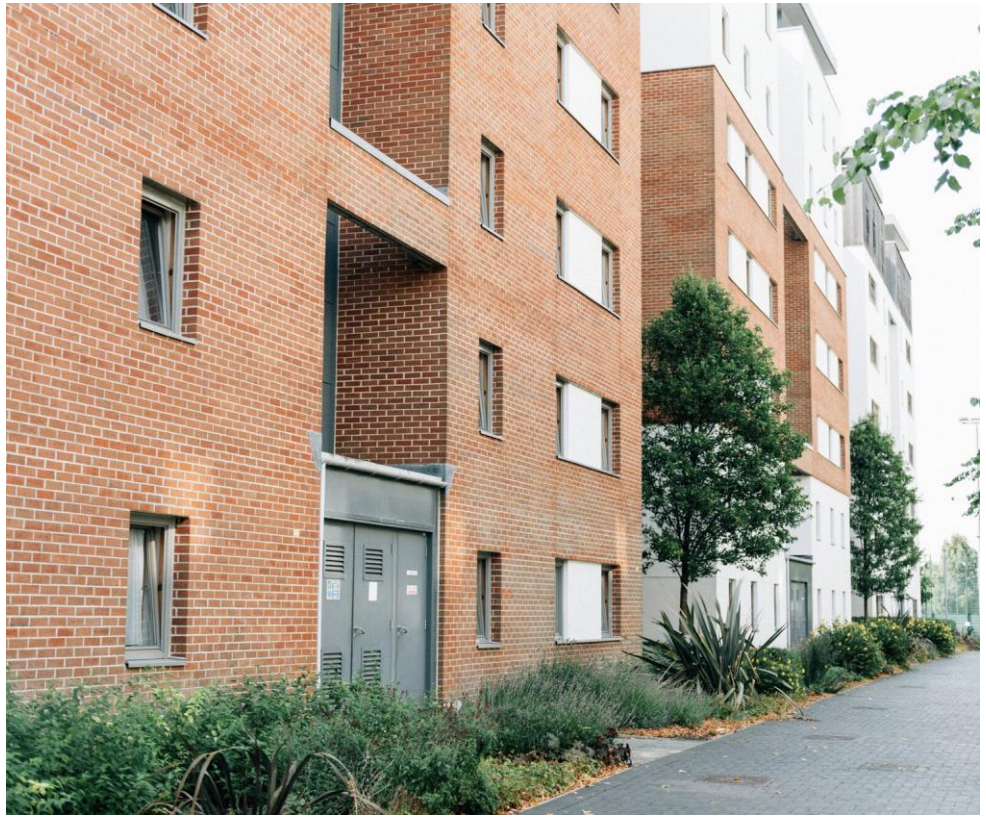
YES **The BAP applies to this project for iron and steel, construction materials, and manufactured products.**

Because the funds were obligated by HUD after August 23, 2024, the participating jurisdiction needs to ensure BAP compliance for iron and steel, construction materials, and manufactured products.

Examples - Does the BAP Apply?

In January 2025, a grantee commits $1 million in FY2025 HTF funds for the construction of affordable housing for low- and very-low-income families.

Does the BAP apply to this project?



Examples - Does the BAP Apply?

- ✓ The project is a public infrastructure project
- ✓ The grant funds were obligated by HUD on or after August 23, 2024
- ✓ The project's total HTF commitment is $1 million

YES **The BAP applies to this project for iron and steel, construction materials, and manufactured products.**

Examples - Does the BAP Apply?

A PJ commits $500,000 for HOME Tenant-Based Rental Assistance program for City residents using FY2024 and FY2025 HOME funds.

Does the BAP apply to this project?



Examples - Does the BAP Apply?

- ✓ The project's total budget is $500,000
- ✓ The project funds were obligated by HUD after August 23, 2024
- ❖ The BAP does not apply because it is not a public infrastructure project. The BAP does not apply to TBRA.

NO **The BAP does not apply because the project is NOT a public infrastructure project.**

Key Takeaways

Key Takeaways

- The BAP applies to projects that include the construction, alteration, maintenance, and repair of public infrastructure.
- The BAP applies to all iron and steel, construction materials, or manufactured products in projects using HOME and HTF funds obligated by HUD after August 23, 2024, which means grants from FY24 or later.
- PJs and grantees should review their pipeline of planned projects to identify which funding sources and materials are subject to the BAP.
- For more details on these items, refer to the CPD Overview Quick Guide posted on the HUD Exchange.

Key Takeaways

- PJs and grantees should review the steps in Notice CPD-25-01 to determine applicability of the BAP at the project and product level.
- PJs and grantees should document the process to analyze if the BAP applies as part of recordkeeping for HOME or HTF funded public infrastructure projects.
- Include the BAP language in all written agreements, contracts, subawards, and material procurement documents.

Key Takeaways

General waivers include:

- Exigent Circumstances
- Small Grants and De Minimis
- Tribal Recipients
- Pacific Island/Territory Communities
- Phased Implementation

Project-specific waivers include:

- Public Interest
- Nonavailability
- Unreasonable Cost

*Remember to **plan ahead**.*
Waiver processing can take several months.

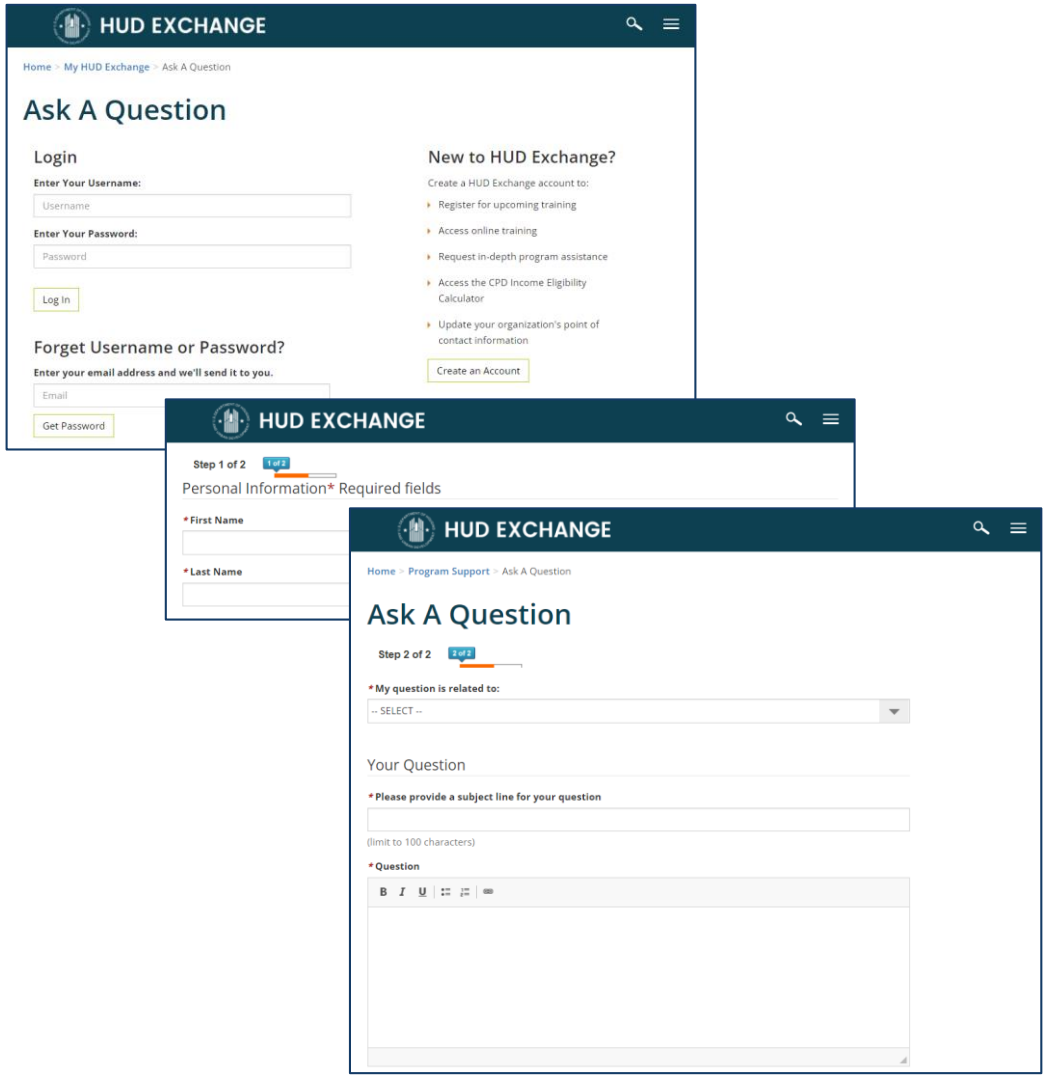
Resources

- BABA on HUD Exchange
- BABA on HUD.gov
- BABA CPD Overview Quick Guide
- CPD BABA Implementation Notice (CPD-25-01)
- 2 CFR 184
- 2 CFR 200.322

Questions?
Submit an AAQ on HUDExchange

BABA AAQ on HUD Exchange

- Go to HUD Exchange AAQ website
- Log in or create an account
- Enter Personal Information
- Enter Question
  - My question is related to:
    BABA: Build America, Buy America Act



BABA Webinar Series

Topic	Date	Time
BABA Webinar for HUD CPD grantees	Materials posted to BABA on HUD Exchange	
BABA Webinar for CDBG and RHP grantees	Materials posted to BABA on HUD Exchange	
BABA Webinar for ESG and CoC grantees	Materials posted to BABA on HUD Exchange	
BABA Webinar for HOPWA s	Materials posted to BABA on HUD Exchange	
BABA Beyond the Basics: Implementing the BAP	Materials posted to BABA on HUD Exchange	
BABA Webinar for HOME Participating Jurisdictions and HTF Grantees	Materials posted to HUD Exchange LMS	

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