



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-3000

OFFICE OF LEAD HAZARD CONTROL
AND HEALTHY HOMES

October 5, 2023

POLICY GUIDANCE: PGI 2024-01
SUBJECT: OLHCHH Build America, Buy America Act (BABA) Guidance
STATUS: Current
APPLICABILITY: The Office of Lead Hazard Control and Healthy Homes (OLHCHH) grant program recipients using grant funds for construction, alteration, maintenance, or repair of buildings and real property (and other types of infrastructure) in the United States
RELATED GUIDANCE: HUD's Build America, Buy America (BABA) website¹
COMMENTS: Departmental BABA guidance is under active development; the OLHCHH will advise its grantees of changes as they occur

Background: The Build America, Buy America Act (BABA) is part of the Infrastructure Investment and Jobs Act (IIJA; Public Law No. 117-58).² BABA can be found at §§ 70901 - 70952 of IIJA. BABA established a domestic content procurement preference, the Buy America Preference (BAP), for certain federal financial assistance grants.

Applicability: Grants awarded by the Office of Lead Hazard Control and Healthy Homes (OLHCHH) that assist "infrastructure projects" (as defined below) are covered by BABA, so that the BAP applies unless HUD has waived its applicability.

Infrastructure projects are projects that involve construction, alteration, maintenance, or repair of buildings and real property (and other types of infrastructure)³ in the United States. For OLHCHH grants, this includes lead hazard reduction activities and healthy homes interventions.

¹ https://www.hud.gov/program_offices/general_counsel/BABA

² <https://www.congress.gov/bill/117th-congress/house-bill/3684/text>

³ BABA § 70912(5):

Infrastructure.--The term "infrastructure" includes, at a minimum, the structures, facilities, and equipment for, in the United States--

- (A) roads, highways, and bridges;
- (B) public transportation;
- (C) dams, ports, harbors, and other maritime facilities;
- (D) intercity passenger and freight railroads;
- (E) freight and intermodal facilities;
- (F) airports;
- (G) water systems, including drinking water and wastewater systems;
- (H) electrical transmission facilities and systems;
- (I) utilities;
- (J) broadband infrastructure; and
- (K) buildings and real property.

Covered items: Under a HUD waiver,⁴ when BABA applies to a project, the BAP requires that certain products used in covered infrastructure projects be produced in the United States:⁵

- a. For iron and steel, the BAP applies to OLHCHH grants whose funds are obligated on or after February 22, 2023; and
- b. For manufactured products and construction materials, the BAP applies to OLHCHH grants whose funds are obligated on or after August 23, 2024.

Waivers: HUD has also waived the application of the BAP for any infrastructure project whose total assistance (from the OLHCHH, other HUD offices and other federal agencies) is equal to or less than \$250,000,⁶ the current amount of the simplified acquisition threshold.⁷ If the total assistance in a project is above the simplified acquisition threshold, then the waiver does not apply to the HUD assistance for that project, and the BAP applies to covered purchases for that project.

Grantees may request a waiver of the application of the BAP in accordance with guidance published by the Office of Management and Budget (OMB) or HUD. As of the date of issuance of this policy guidance, the procedures are being developed; the OLHCHH will advise grantees when the procedures are established.

⁴ [88 Federal Register 17001-17004](#), March 21, 2023.

⁵ BABA § 70912(6):

The term “produced in the United States” means--

(A) in the case of iron or steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States;

(B) in the case of manufactured products, that--

(i) the manufactured product was manufactured in the United States; and

(ii) 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, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation; and

(C) in the case of construction materials, that all manufacturing processes for the construction material occurred in the United States.

Regarding construction materials, BABA § 70917(c)(1) says that cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives are not covered by the Buy America Preference.

⁶ [87 Federal Register 76502-76505](#), December 14, 2022.

⁷ Per the definitions in OMB’s grants guidance at [2 CFR § 200.1](#) and the Federal Acquisition Regulation at [48 CFR § 2.101](#).

Current waivers of the BAP , guidance on HUD’s implementation of BABA, any future HUD waivers of the BAP, and information on procedures for grantees to request a waiver can be found at HUD’s Build America, Buy America Act (BABA) website.⁸

Product Search Requirements before Seeking a Waiver:

The OLHCHH expects a product purchaser⁹ under one of its grants covered by BABA to initially seek BABA compliant products through the standard methods the purchaser has used in the past. If a product purchaser is unable to find an available BABA compliant product using standard methods, it must diligently search further before seeking a waiver of the BABA requirements. Purchasers of products using funds subject to BABA requirements can seek a waiver for nonavailability through the grantee only after actively searching for BABA compliant products.

Further search guidance is provided in the attachment, Minimum Due Diligence Product Search Requirements before Seeking a Waiver.

Documentation of Compliance with the Buy America Preference:

Grantees must maintain adequate records to demonstrate that they complied with BABA in purchasing products with funds subject to BABA. At a minimum, the records must track product purchases in sufficient detail to identify the source of the funding for the purchase; and demonstrate compliance with BABA, whether by showing compliance with BAP requirements or by showing that the purchase was covered by a waiver or other exemption. A grantee does not have to maintain product purchase documentation where HUD waives from the BAP either all products purchased under the grant or products for a specific infrastructure project.

Further guidance on documentation, is provided in the attachment, Documentation of Compliance with the Buy America Preference.

For any questions about this policy guidance or BABA, OLHCHH grantees should contact their grant’s Government Technical Representative.

Attachments

- 1: Minimum Due Diligence Product Search Requirements before Seeking a Waiver
- 2: Documentation of Compliance with the Buy America Preference

⁸ https://www.hud.gov/program_offices/general_counsel/BABA.

⁹ Product purchasers include the grantee or a subgrantee, contractor or subcontractor at any level.

Minimum Due Diligence Product Search Requirements before Seeking a Waiver

The OLHCHH expects a product purchaser¹⁰ under one of its grants covered by BABA to initially seek BABA compliant products through the standard methods the purchaser has used in the past. If a product purchaser is unable to find an available BABA compliant product using standard methods, it must diligently search further before seeking a waiver of the BABA requirements. Purchasers of products using funds subject to BABA requirements can seek a waiver for nonavailability through the grantee only after actively searching for BABA compliant products:

1. For micro-purchases as defined by 2 CFR 200.1, which are, as of October 2023, up to \$10,000,¹¹ but can be adjusted to a higher level upon HUD approval):
 - a. Purchasers must search for the product using one of the top five Internet search engines most used in the U.S.,¹² or the website of one of the top five home improvement retailers¹³ while using one of the following search terms: “made in America” or “made in the USA.”
 - b. If none of the top 10 results of the search indicate that the product is made in America, the product purchaser is not required to search further prior to submitting a waiver request.
 - c. If one or more of the search results indicates the product is made in America, the product purchaser must take the additional step of contacting the maker(s) of the product by email or by phone to confirm that the product meets the BABA requirements for the product. If the product maker either confirms that the product is not BABA compliant or that BABA compliance is uncertain, or if the product maker fails to respond to the inquiry within two business days, the product purchaser is not required to search further prior to submitting a waiver request.

¹⁰ Product purchasers include the grantee or a subgrantee, contractor or subcontractor at any level.

¹¹ 48 CFR 2.101 “Micro-purchase threshold”, which is invoked by the micro-purchase definition at 2 CFR 200.1.

¹² Based on a Google.com search for the “[top five most used U.S. Internet search engines](#)”, the [GS.Statcounter.com](#) website showed that, as of September 2023, Google, Bing, Yahoo!, DuckDuckGo, and Ecosia had the largest search engine market shares in the U.S. This will vary over time and may vary among different internet surveyors, and should be checked upon searching for BABA compliant products when considering seeking a non-availability waiver

¹³ Based on a Google.com search for the “[top five U.S. home improvement retailers](#)”, the [Disfold.com](#) website showed that, as of July 1, 2023, The Home Depot, Lowe’s Companies, Floor & Decor Holdings, Leslie’s, and Haverty Furniture Companies had the largest capitalization of home improvement retailers in the U.S. This will vary over time and may vary among different home improvement retailer surveyors, and should be checked upon searching for BABA compliant products when considering seeking a non-availability waiver.

2. For small purchases as defined by 2 CFR 200.320(a)(2), that is, up to the simplified acquisition threshold as defined 2 CFR 200.1, which is, as of October 2023, \$250,000:
 - a. Purchasers must search for the required product using at least two search attempts at least two business days apart using one of the top five most used Internet search engines and the website of one of the top five home improvement retailers while using one of the following search terms: “made in America” or “made in the USA.”
 - b. If none of the top 20 results of both searches indicate that the product is made in America, the product purchaser is not required to search further.
 - c. If one or more of the search results indicates the product is made in America, the product purchaser is to contact the maker(s) of the product by email or by phone to confirm that the product meets the BABA requirements for the product. If the product makers either confirm that the maker’s product is not BABA compliant or that BABA compliance is uncertain, or if the product maker fails to respond to the inquiry within two business days, the product purchaser is not required to search further.
3. For purchases that exceed the simplified acquisition threshold amount as defined 2 CFR 200.1, which is, as of October 2023, \$250,000:
 - a. The Purchaser must search for the required product using at least three search attempts at least three business days apart using one of the top five most used Internet search engines and the website of one of the top five home improvement retailers while using one of the following search terms: “made in America” or “made in the USA.”
 - b. If none of the top 30 results of both searches indicate that the product is made in America, the product purchaser is not required to search further.
 - c. If one or more of the search results indicates the product is made in America, the product purchaser is to contact as many makers as the search results indicate are made in America, up to a maximum of five products, by email or by phone to confirm that the product meets the BABA requirements for the product. If the contacted product makers either confirm that the maker’s product is not BABA compliant or that BABA compliance is uncertain, or if the product maker fails to respond to the inquiry within five business days, the product purchaser is not required to search further.

Documentation of Compliance with the Buy America Preference

Grantees must maintain adequate records to demonstrate that they complied with BABA in purchasing products with funds subject to BABA. At a minimum, the records must:

1. Track product purchases in sufficient detail to identify the source of the funding for the purchase; and
2. Demonstrate compliance with BABA:
 - a. For products purchased in compliance with the Buy America Preference (BAP), documentation that the product complied with BAP requirements; and
 - b. For products purchased pursuant to a waiver or other exemption from the BAP, adequate information to validate that the purchase was covered by a waiver or other exemption.

While grantees are responsible for maintaining adequate records related to BABA compliance, many product purchases will be made by the grantees' contractors.¹⁴ Grantees should include provisions in solicitations to ensure that contractors provide sufficient product purchase information to grantees to enable them to comply with the minimum BABA documentation requirements.

Grantees may choose to maintain a record of BABA compliance in product purchases themselves. If so, they must maintain those records a way that covers all product purchases until 3 years after project completion.

A grantee does not have to maintain product purchase documentation where HUD waives from the BAP either:

1. All products purchased under the grant (e.g. the grant's funding is less than the small purchase threshold); or
2. Products for a specific infrastructure project (e.g. the project's cost is less than the small purchase threshold).

A grantee can provide adequate confirmation that a product was purchased in compliance with the BAP with:

1. 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

¹⁴ Product purchasers include the grantee or a subgrantee, contractor or subcontractor at any level.

2. A certificate from the manufacturer or reseller that the product complies with BABA; or
3. For product purchases below the simplified acquisition threshold, either a copy of a product specification that provides sufficient detail to conclude that the product complies with BABA, or a communication other than a certification from a manufacturer or reseller that confirms that the product complies with BABA.