**Buy America Preference: Build America Buy America Act (BABA)** - The Build America, Buy America Act (BABA) requires that all iron, steel, manufactured products, and construction materials used for federally funded infrastructure projects are produced in the United States, unless otherwise exempt or subject to an approved waiver. This requirement is known as the “Buy America Preference (BAP)” and the specific requirements are codified in 2 CFR § 184.

**The products covered under the BABA act are:**

Iron and Steel: Items that consist completely or predominantly of iron, steel, or a combination of both. “Predominantly” means the cost of the iron and steel content exceeds 50% of the total cost of all the item’s components. All manufacturing processes, starting from the initial melting stage and continuing through the application of coatings, must occur in the United States.

Construction Materials: Articles, materials, or supplies used for construction activities that consist of only one of the items described below. For the purposes of the HUD Phased Implementation Waiver timeline described below, construction materials are divided into two categories: specifically listed construction materials and not listed construction materials. Specifically Listed Construction Materials: Items include (1) non-ferrous metals; (2) lumber; and (3) plastic- and polymer based composite building materials, pipe, and tube. Not Listed Construction Materials: Items include (1) all other plastic- and polymer-based materials (such as polymers used in fiber optic cables), (2) glass, (3) fiber optic cable, (4) optical fiber, (5) engineered wood, and (6) drywall. Construction Material Standards (2 CFR 184.6) All manufacturing processes for the construction material must occur in the United States.

Manufactured Products: Manufactured products include articles, materials, or supplies that have either been: 1. Processed into a specific form or shape, or 2. Combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies. A manufactured product may include components that are construction materials or iron and steel products, unless the manufactured product also meets the definition of iron and steel or construction materials. In such instances, the product should be re-categorized in the appropriate category. Determining the Cost of Components for Manufactured Products (2 CFR 184.5) Manufactured products must meet two production requirements. First, the final product must be manufactured in the United States. Second, at least 55% of the cost of the components making up the manufactured product must be associated with components that were mined, produced, or manufactured in the United States.

**BABA Applicability on CDBG and RHP projects:**

The Buy America Preference references that all infrastructure projects are included, an infrastructure project is defined broadly as any project that includes Construction, Maintenance, Alteration, or Repair (applies even if the primary purpose is not infrastructure).

Examples of CPD-funded activities that may be subject to the BAP: • Rehabilitation of buildings and real property • Construction of public facilities and improvements, such as streets, sidewalks, neighborhood centers, and the conversion of buildings for eligible purposes • Utility installation or improvements • Water systems (drinking water and wastewater) • Electrical transmission facilities and systems • Broadband infrastructure • Transportation infrastructure

Examples of CPD-funded activities that may NOT be subject to the BAP: • Acquisition of real property • Relocation and demolition • Public services • Shelter or public facility operating expenses • Supportive services • Short-term payments to prevent homelessness • Special economic development activities • Administrative activities • Disaster and emergency response

General Waivers

HUD issued a public interest waiver for exigent circumstances, “Public Interest Waiver of Build America, Buy America Provisions for Exigent Circumstances as Applied to Certain Recipients of HUD Federal Financial Assistance”. This waiver applies when there is an urgent need by a CPD grantee to immediately complete an infrastructure project because of a threat to life, safety, or property of residents and the community. (Effective until November 23, 2027, or such shorter time as HUD may announce via Notice.)

HUD also issued a public interest de minimis, small grants, and minor components waiver titled “Public Interest De Minimis and Small Grants Waiver of Build America, Buy America Provisions as Applied to Certain Recipients of HUD Federal Financial Assistance”. This waives the BAP 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 which is currently $250,000. This Notice also waives the application of the BAP for a de minimis portion of an infrastructure project, meaning a cumulative total of no more than 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. (Effective until November 23, 2027, or such shorter time as HUD may announce via Notice.)

To facilitate a smooth transition to the BAP requirements, HUD established a Phased Implementation Waiver for its programs based on the date when funds are obligated to the State. All CDBG Formula Grants and Recovery Housing Program Grants funded in FY 2024 that meet BABA requirements and involve the use of Iron and Steel and Construction materials listed (i.e.(1) non-ferrous metals; (2) lumber; and (3) plastic- and polymer based composite building materials, pipe, and tube). Starting in FY 2025, all projects that meet BABA requirements and involve construction materials not listed and manufactured products will be applicable to BAP.

**If it is determined that any additional construction materials are needed that were not included on the itemized cost estimate during the application phase, then the contractor is required to inform OCD and ensure BABA requirements are implemented as needed.**

\*Guide to Help Grantees Determine if BABA Applies (Exhibit b-)

\* The prime contractor and all subcontractors must comply with the requirements of the BABA Act, 41 USC 8301 note, and all applicable rules and notices, as may be amended, as applicable to the Community Development Block Grant (CDBG) and Recovery Housing Program (RHP) infrastructure projects. Pursuant to the U.S. Department of Housing and Urban Development’s (HUD’s) notice, “Public Interest Phased Implementation Waiver for FY2022 and 2023 of Build America, Buy America Provisions as Applied to Recipients of HUD Federal Financial Assistance” (88 FR 17001), any funds obligated by HUD on or after the applicable listed effective dates, are subject to BABA requirements, unless excepted by a waiver. A “Buy America Certification Form” must be completed by the prime contractor at the time of the pre-construction conference. (Exhibit b-)

\*Language added to example construction contract making BABA a required included clause.

**BABA: HUD Project Specific Requested Waiver:**

Project/product-specific waivers are available on a **limited, case-by-case basis,** after OCD and HUD’s review, a public comment period, and final approval from the Office of Management and Budget’s Made In America Office (MIAO). A waiver should be requested from OCD if an extenuating circumstance occurs that meets one of the following criteria: 1. Public interest: Adhering to the BAP would be inconsistent with the public interest. 2. Non-availability: Covered materials are not produced in the USA in sufficient and reasonably available quantities or of a satisfactory quality. 3. Unreasonable cost: Inclusion of domestically produced covered materials will increase the cost of the overall project by more than 25 percent. If more than one Federal agency is funding an infrastructure project, project-specific waivers will require coordination among those Federal agencies prior to a determination by the MIAO. **Due to the time restraints attached to CDBG projects OCD will only approve timely waivers be sent to HUD with substantial documentation meeting the above listed criteria.**