Homes and Community Renewal
Housing Trust Fund Corporation

# Buy America Preference Guidance & Applicability Checklist

## I. Background and Requirements

This checklist is used to provide guidance to Housing Trust Fund Corporation ("HTFC") grant recipients and to assist with determining if the Buy America Preference applies to a public infrastructure project funded by HTFC. This checklist should be submitted to NYS Homes and Community Renewal ("HCR") and retained for recordkeeping purposes.

The Build America, Buy America Act ("BABA") was signed into law by President Biden on November 15, 2021, as part of the Infrastructure Investment and Jobs Act (IIJA) as Sections 7090152 of Pub. L. No. 117-58. In addition to providing funding for roads, bridges, rails, and high-speed internet access, it created an incentive to increase domestic manufacturing across the country through the inclusion of BABA's "Buy America Preference" ("BAP"). In general, the BAP requires that all iron, steel, manufactured products, and construction materials used in public infrastructure projects funded with Federal financial assistance ("FFA"), as outlined in Section 70914(a) of BABA, must be produced in the United States.

Summary of BABA Requirements and Related Forms:

| **Activity** | **Link to Applicable Form** |
|---|---|
| A. Pre Construction Bid Award | |
| Bid Language: Include BABA Requirements when advertising for bids to ensure responsible bid responses. For recommended language see Section IV below. | See Section IV Below |
| B. Submit **this** checklist and the BABA-Covered Materials List and Certification form | |
| Required Documents:<br>- BAP Guidance & Applicability Checklist<br>- BAP Covered Materials List and Certification Form<br>These forms should be submitted to HCR prior to pre-construction meeting. | FORMS found under Reporting |
| C. Post Construction Bid Award | |
| Finalize/Update list of materials based on the bid award as needed | Covered Materials List and Sample Certification FORM |
| As materials are ordered, request a Manufacturer's Certification or equivalent for all BABA-applicable materials. Alternatively, a BABA Material's Certification may be completed by the Prime Contractor to certify all applicable materials are produced in the United States. For a list of acceptable documentation, see the Section VII. FAQ below. | |
| Review and update the material list as necessary with each submitted Change Order or Disbursement Request. | |
| D. Payment Requests | |
| Submit an up-to-date materials list and any relevant certifications with each payment request for construction funds. | Covered Materials List and Sample Certification FORM |

## II. Project Information

| | |
|---|---|
| Grantee | |
| Grant/Contract Number | |
| Activity Name | |
| HCR Funding Sources | CDBG |

## III. BAP Applicability

There are two tests necessary to determining if BAP is applicable to the project.

1. Does the project meet the definition of public infrastructure under 2 CFR 184, and
2. Does the date the funds were obligated to HTFC fall on or after the effective date of the BAP

### 1. Definition of Public Infrastructure

BAP applies to any public infrastructure project that involves the construction, alteration, maintenance, or repair of public infrastructure, regardless of whether infrastructure is the primary purpose of the project. Infrastructure as described in 2 CFR 184.4(c), includes, at a 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.

BAP generally applies to federal funds provided for housing projects with five or more units, including onsite utilities and related activities unless BABA waiver or exemption applies. Housing projects with one to four units are considered “private”, consistent with HUD’s definition of single-family housing, and therefore not considered public infrastructure and are not subject to the BAP.

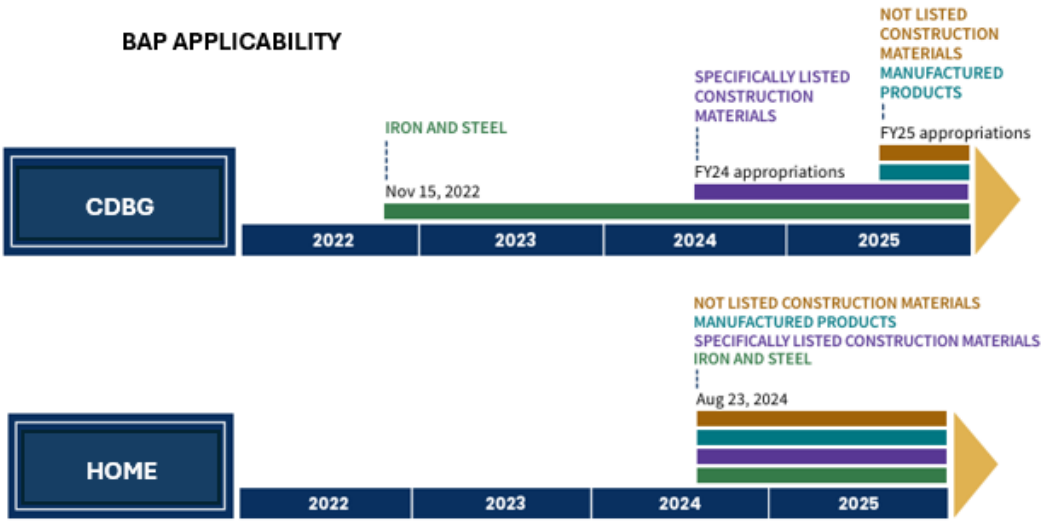
Check the box below that applies to the proposed project:

| | |
|---|---|
| ☐ | Meets the definition of infrastructure described in 2 CFR 184.3 & 184.4 |
| ☐ | Is a housing project with five or more units |
| ☐ | Does not meet the definition or is a housing project with one to four units. If so, STOP. Do not proceed with this checklist; BAP does not apply to your project. |

### 2. Date the funds were obligated by HUD to HTFC

Use the phased implementation table below to determine when the BAP applies to each classification of Covered Materials, based on the obligation date for the applicable funding program. The obligation date is generally the date of the contract between HUD and HTFC, not

the date of the contract between HTFC and their grantee. This varies based on award, and HCR will notify their grantee of the obligation date applicable to their award and BAP.




## IV. Bid Advertisement Language Will Satisfy BABA Requirements

Language notifying subrecipients that the procurement of materials for public infrastructure projects must comply with the BAP must be included in all subawards, contracts, purchase orders, requests for proposals, and all other relevant procurement and bid documents. Sample language that grantees may use for this purpose is included below:

> "Pursuant to the Build America, Buy America Act (BABA), enacted as part of the Infrastructure Investment and Jobs Act (IIJA). Pub. L. 117-58, 41 U.S.C. § 8301 note, the Federal Financial Assistance used to fund this infrastructure project is required to apply a domestic content procurement preference (the "Buy America Preference" or "BAP") for all construction, alteration, maintenance, or repair of infrastructure, including buildings and real property, unless application of the BAP has been waived by HUD. Additional details on fulfilling the BABA requirements can be found at https://www.hud.gov/baba."

## V. Will the project use Covered Materials

Each material should be classified into only one of the categories listed below. Use the HCR BABA-Covered Materials List and Certification form (FORM) to identify the bid item most closely associated with each material. Check the box below for each type of covered materials incorporated into this infrastructure project:

| | |
|---|---|
| ☐ | Iron or Steel |
| ☐ | Specifically Listed Construction Materials |
| ☐ | Not Listed Construction Materials |
| ☐ | Manufactured Products |

HCR will accept the following documentation as proof of BABA compliance:

- A copy of the label indicating the material was made in the United States;
- A copy of the product description or technical specifications that provides sufficient detail to conclude that the materials comply with BABA;
- A certificate or other documentation from the manufacturer demonstrating that the materials comply with BABA;
- A signed letter from the manufacturer of the materials certifying compliance with BABA; or
- A signed "BABA Materials Certification" provided by the contractor of a project. A sample form can be found here: Reporting

HCR reserves the right to request additional documentation at any time.

## VI. General Waiver Applicability

In rare instances, a HUD issued general waiver may be available. Information on waivers can be found here: https://www.hudexchange.info/programs/baba/waivers/ .

1. **The De Minimis, Small Grants, and Minor Components Waiver:**
   This waiver is available through November 23, 2027 and offers flexibility to incorporate Covered Materials of foreign or unknown origin up to 5% of the total cost of Covered Materials used in the project or $1 million, whichever is less. The total cost of Covered Materials includes all classifications of materials. This waiver advances compliance with the BAP by reducing the administrative burden to grantees where the costs of compliance with the BAP could distract from the focus on higher value BAP-compliant items.

   When using the De Minimis waiver, the grantee should document which Covered Materials the waiver was applied to in the project records, which is accomplished by attaching the BABA-Covered Materials List and Certification form to this Checklist.

| | |
|---|---|
| Enter the total cost of all Covered Materials: | |
| Multiply that amount by 0.05 (5%): | |
| Enter the lower of the number calculated in the row above or $1,000,000 (De Minimis Amount): | |

   The amount in the third row above is the De Minimis limit for this project. The BAP can be waived for Covered Materials from foreign or unknown sources at a cost not to exceed the De Minimis limit of 5% of the total cost of materials or $1,000,000 (whichever is less). The BAP will still apply to other Covered Materials used in the project.

2. **Exigent Circumstances Waiver:**

   This public interest general waiver is effective through November 23, 2027, for projects that must be completed immediately to protect life, ensure safety, or prevent the destruction of property.

When using the Exigent Circumstances waiver, the grantee should document how it determined that a Exigent Circumstances waiver applied to the project by writing a memo and attaching it to this Checklist.

Check the box below for the waiver that applies to the project.

| | |
|---|---|
| ☐ | The total cost of the project from all sources (Federal and non-Federal) is $250,000 or less. If checked, ***the Small Grants Waiver*** applies, and the project is exempt from the BAP. |
| ☐ | There is an urgent need to immediately complete the project because of a threat to life, safety, or property. If checked, the ***Exigent Circumstances Waiver*** applies, and the project is exempt from the BAP. |
| ☐ | None of the above apply – proceed to Section V. |

## VII. Is there a need for a project-/product-specific waiver?

If the BAP applies to a project and all general waiver flexibilities have been utilized, but there are remaining Covered Materials that can only be sourced from foreign or unknown sources, then a grantee may apply for a project-/product-specific waiver.

☐ Yes See guidance below on submitting a project-/product-specific waiver

☐ No Stop here and retain this analysis in project records.

## VIII. Submitting a Project-/Product-Specific Waiver

Consider the following criteria for project-/product-specific waiver to determine eligibility:

1. Is applying the BAP to the project inconsistent with the public interest?
2. Are the materials used in the project not produced in the United States or not available in sufficient quantities?
3. Would the inclusion of domestically produced materials increase the cost of the overall project by more than 25 percent?

If yes to questions 1, 2, and 3, then a BAP waiver may be considered. Project-/product-specific waivers are available on a limited, case-by-case basis, after HUD's review, a public comment period, and final approval from the U.S. Made in America Office (MIAO).

Project-/product-specific waivers cannot be approved retroactively for items that have already been purchased or incorporated into a project, so HCR grantees should determine if a project-/product-specific waiver is needed as early as possible in the planning process.

STEPS TO APPLY

1. **Complete the BAP analysis outlined in Sections I – VI above** to confirm that the project is subject to BAP and that the HCR grantee has maximized the flexibility provided by HUD general waivers.
2. **Complete the necessary market research to support the need for a waiver**. Market research may be completed by the grantee or the subrecipient/contractor who has been awarded funds and is purchasing the materials that will be incorporated into the infrastructure project. Acceptable market research strategies may include one or more of the following:
    a) Document the report showing results of supplier scouting services provided by the NIST MEP, or similar supplier scouting service. For more information about the supplier scouting process, contact the local MEP center.
    b) Document that the purchaser has made a good faith effort to contact a minimum of three (3) manufacturers or suppliers to determine if a BABA compliant material is available in sufficient quantity and satisfactory quality. Documentation may include PDF files or screenshots of Internet searches or email communications, or documentation of phone conversations that notes the date and time of the call, the contact person with whom the purchaser spoke, and a summary of the information received.
3. **Collect the required information** and documentation described above and submit to HCR
4. **HCR may submit a BABA waiver application** on behalf of the project once all documentation is reviewed and validated through the BABA Waiver Submission Site.
5. **If an application is approved**, HUD will post the proposed waiver in the Federal Register for a minimum 15-day public comment period and submit the request to the MIAO. The MIAO will then review the proposed waiver and public comments for final approval, and communicate a final decision to HUD, which will communicate it to HCR.

Signature

Completed By: Date Completed:

*Must be signed by authorized Representative Only – not a consultant or engineer*