

Northwest Indian Housing Association Build America, Buy America Act (BABA) Training

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Overview of Build America, Buy America Act (BABA)

- Enacted on November 15, 2021, as part of the Infrastructure Investment and Jobs Act (“IIJA” or “Bipartisan Infrastructure Deal”) (Pub. L. 117–58, §§ 70941–70941)
- Establishes a domestic content procurement preference (“Buy America Preference” or “BAP”) for Federal Infrastructure programs
 - “Buy America Preference” means the “domestic content procurement preference” set forth in section 70914 of BABA

Overview of Build America, Buy America Act (BABA) (Cont'd)

- Buy America Preference (BAP):
 - Requires each Federal agency (i.e. HUD) ensure that none of the funds made available for a Federal award for an Infrastructure Project may be obligated unless all of the iron, steel, manufactured products, and construction materials incorporated into the project are produced in the US
 - Requires that all federal agencies ensure that any infrastructure project funded by federal financial assistance complies with the BABA requirements

Overview of Build America, Buy America Act (BABA) (Cont'd)

- BABA regulations are located at 2 CFR Part 184 and incorporated into 2 CFR Part 200
- The U.S. Office of Management and Budget (OMB) will be regulating and enforcing the BABA requirements, through its Made in America Office (MIOA)
 - OMB has so far taken a strict, narrow stance on enforcing BABA requirements

Tribal Waivers

- HUD issued a tribal waiver, waiving BABA requirements for all tribes and tribally designated housing entities (TDHEs) from 2022 through **September 30, 2024**
 - BABA requirements do not apply to funds obligated by HUD to tribes/TDHEs prior to September 30, 2024
- Other federal agencies (e.g., U.S. Department of Agriculture) have also issued temporary tribal waivers
- Once those waivers expire, tribes and TDHEs will be required to comply with BABA

Purpose of BABA

- The purpose of this training is to provide guidance on compliance with BABA
 - We have designed this training based on existing laws, regulations, and guidance
 - HUD's Office of Native American Programs (ONAP) has not yet issued guidance for tribes
 - Our training is therefore based on the BABA statute and regulations, OMB guidance, existing HUD's guidance for non-tribal programs, and guidance released by other federal agencies
 - Our training is based on taking a conservative approach to complying with BABA

Why did Congress enact BABA?

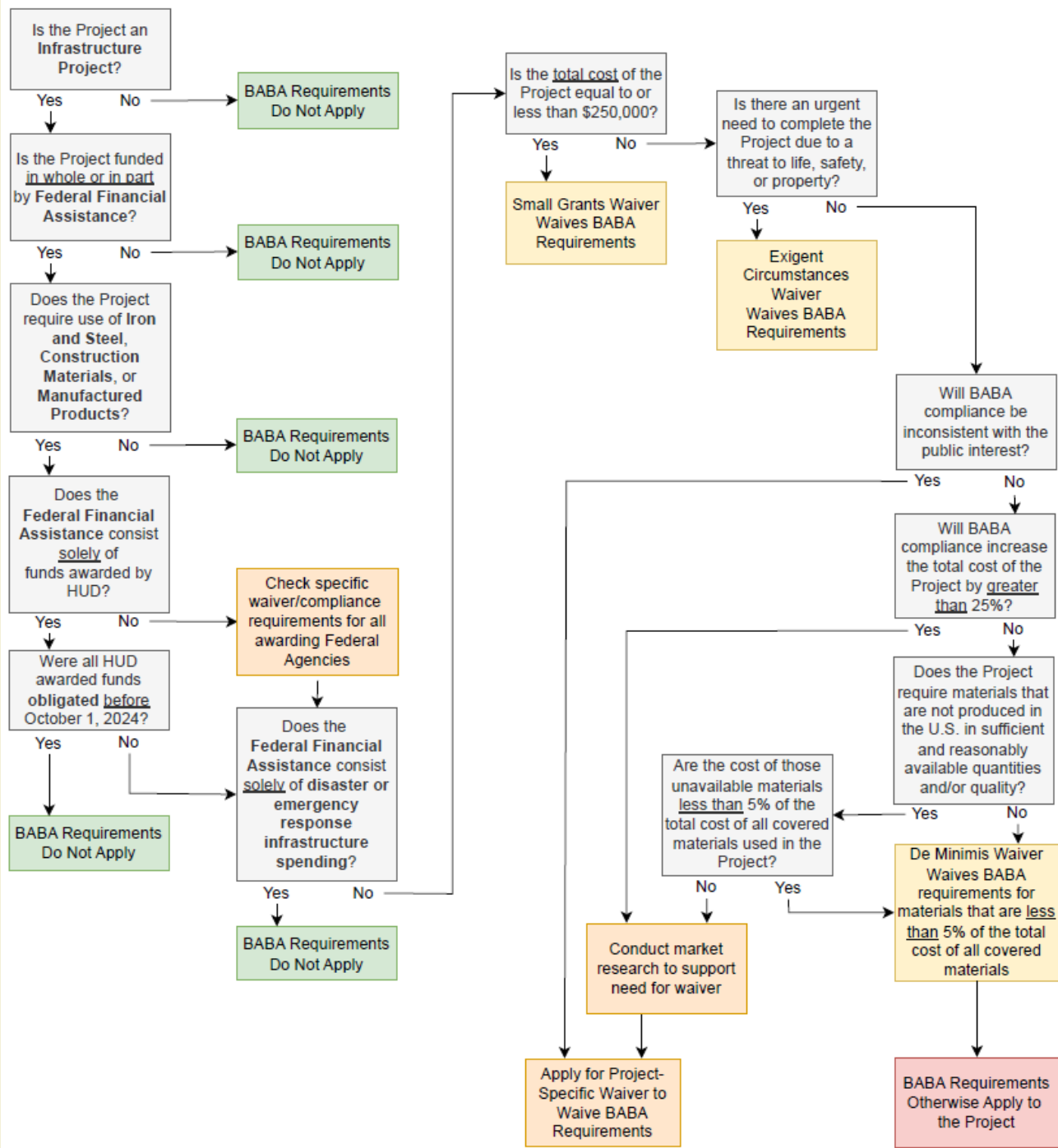
- Congress passed the Infrastructure Investment and Jobs Act and BABA with the intent to invest in the American manufacturing industry
 - “The intent of the BAP in BABA is to stimulate private-sector investments in domestic manufacturing, bolster critical supply chains, and support the creation of well-paying jobs for people in the United States
 - The preference is also intended to bolster American firms’ ability to compete and lead globally for years to come by requiring entities that receive Federal infrastructure funds to use American materials and products”

HUD Tribal Waiver Extension is Unlikely

- The Infrastructure Investment and Jobs Act was one of the key pieces of legislation advocated for and signed into law by the Biden administration. Because of that, any Democratic administration is unlikely to approve a broad waiver of applicability for tribes or for low income housing
- It is uncertain what the next administration's stance on BABA will be, but a broad BABA waiver is unlikely
- OMB must approve any waiver of BABA compliance
 - As the BABA enforcement agency, OMB is unlikely to approve any extension of federal agency waivers for tribes

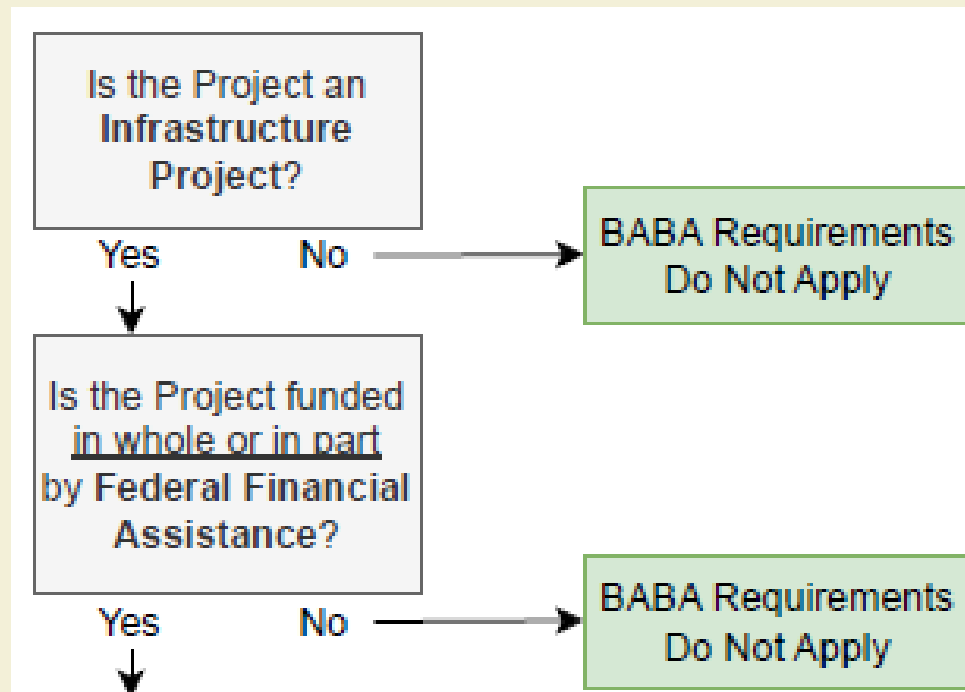
BABA Procedures and Compliance Documentation

- We recommend that each TDHE create procedures regarding BABA compliance, and they should update their procedures as further HUD guidance becomes available
- A TDHE should obtain, create, and maintain thorough documentation to demonstrate BABA compliance on projects subject to BABA
- This includes maintaining documentation of each quote that the TDHE receives and whether or not the Iron or Steel, Manufactured Products, or Construction Materials comply with BABA
 - Retain documentation for at least 3 years, or for a longer record retention period specified in the federal funding award
 - We will cover the specific types of compliance documentation to maintain later



Applicability of BABA Requirements

The BAP applies to all sources of Federal Financial Assistance involving Infrastructure Projects, unless a waiver applies



What is an Infrastructure Project?

- **“Infrastructure Project”** means any activity related to the construction, alteration, maintenance, or repair of “infrastructure” in the United States regardless of whether infrastructure is the primary purpose of the project
 - “Infrastructure” includes buildings, real property, roads, utilities, etc.
 - Federal agencies are instructed to broadly interpret the term “infrastructure,” finding BABA requirements apply when the project will serve a public function

What is Federal Financial Assistance?

- **“Federal Financial Assistance”** or **“FFA”** means assistance provided by the Federal government to a non-Federal recipient or subrecipient to receive or administer that assistance in the form of, but not limited to:
 - Grants
 - Cooperative Agreements
 - Direct appropriations
 - Food commodities
 - Loans / Loan guarantees
 - Interest subsidies
 - Insurance
 - Non-cash contributions or donations of property (including donated surplus property)

Common FFA Sources for TDHEs

- BABA applies to common FFA that a TDHE receives from federal agencies used for Infrastructure Projects, including, but is not limited to:
 - Indian Housing Block Grants (IHBG) Formula
 - IHBG Competitive Grants (starting with FY 2024 IHBG Competitive funds)
 - Indian Community Development Block Grants (ICDBG)

What is NOT Federal Financial Assistance?

- The following types of funding do not qualify as Federal Financial Assistance and are not subject to BABA:
 - Amounts received as reimbursement for services rendered to individuals
 - Expenditures for assistance authorized in the Robert T. Stafford Disaster Relief and Emergency Act or relating to a major disaster or emergency declared by the President, or
 - Pre- and post-disaster or emergency response expenditures

Partial FFA Funding and Pass-Through Funding

- BABA requirements apply to the **entire project**, if at least one part of the project is funded by Federal Financial Assistance
 - For example, if a construction project is initially started without the use of any Federal Financial Assistance covered under BABA, but the TDHE subsequently uses Federal Financial Assistance for a small sub-project within the larger construction project, the entire construction project must comply with BABA
- BABA requirements apply if the funding source includes Federal Financial Assistance, regardless of whether it is a sub-award from a non-Federal agency

Hypothetical

A tribe receives federal funding, and then uses a portion of that federal funding to hire the TDHE to act as the general contractor to build a \$300,000 house. The tribe hired the TDHE through its standard procurement process. Does the TDHE need to ensure that the project complies with BABA?

Answer

Yes. The BAP requirements apply to all FFA and do not distinguish between the end user of the federal funds. The BAP applies as long as the funding is derived from a Federal agency, even if they are a pass-through entity unless a particular section of the terms and conditions of the Federal award specifically indicates otherwise.

What is Included in a Project?

- Projects subject to BABA include the construction, maintenance, alterations, or repairs of Infrastructure
 - Projects cannot be artificially subdivided to avoid BABA requirements
 - HUD guidance states that a “project” includes “all integrally related activities, designed by the recipient to accomplish, in whole or in part, a specific objective”

Hypothetical

A TDHE plans to use Tribal (nonfederal) funds to start the construction of 10 Tribal houses in September 2024 and then plans to use 2024 IHBG competitive award funds to complete the doors of each house. The TDHE begins procuring steel beams for the houses in October 2024 using tribal funds. Does the TDHE need to make sure those steel beams meet the BAP?

Answer

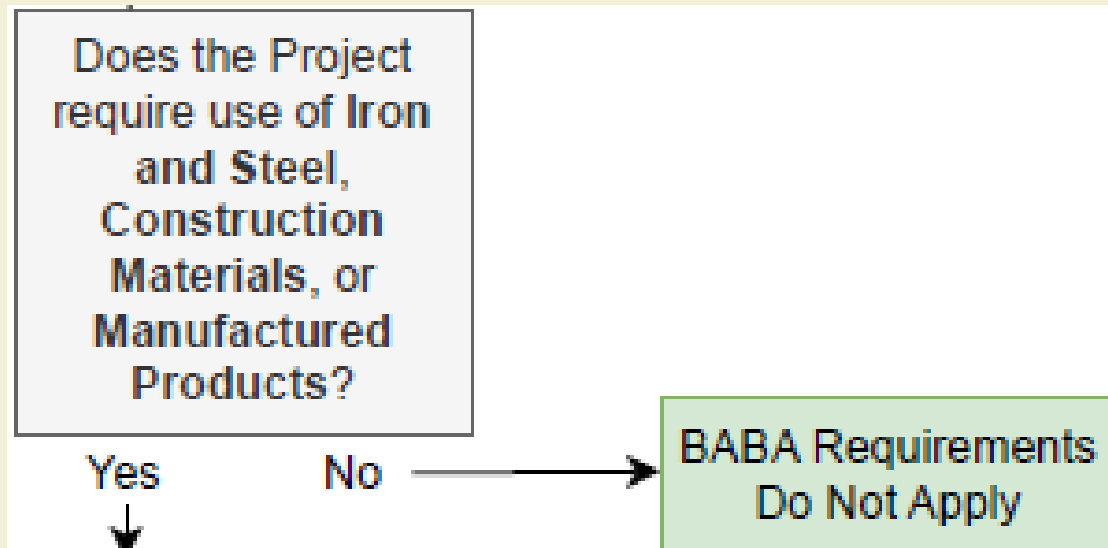
Yes. Door construction is part of the house construction project because the FY24 IHBG Competitive funds have not yet been awarded and hence have not been obligated.

The FY24 IHBG Competitive funds are therefore federal financial assistance and are not subject to the existing HUD waiver for funds obligated prior to September 30, 2024.

The door construction is subject to BABA requirements, and therefore the BABA requirements apply to the entire project.

Materials Subject to BABA

- BABA requirements only apply to Iron or Steel Products, Construction Materials, and Manufactured Products



Iron or Steel Products

- “Iron or Steel Products” means articles, materials, or supplies that consist wholly or predominantly of iron or steel or a combination of both
- BABA requires that these products be “*produced in the United States*” meaning all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States

Manufactured Products

- “Manufactured Products” means 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

Manufactured Products (Cont'd)

- BABA requires that Manufactured Products be “manufactured in the United States”:
 - The cost of the components of the Manufactured Product that are mined, produced, or manufactured in the United States must be greater than 55% of the total cost of all its components
 - This standard applies unless applicable law or regulation sets a standard that meets or exceeds this standard
 - The costs of components of a Manufactured Product are determined according to 2 CFR § 184.5

Construction Materials

- “Construction materials” include articles, materials, or supplies that consist of only one of the items listed below this definition, except as provided in of this definition. To the extent one of the items listed below contains as inputs other items listed, it is nonetheless a Construction Material
 - Non-ferrous metals
 - Plastic and polymer-based products (including polyvinylchloride, 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

Construction Materials (Cont'd)

- Minor additions of articles, materials, supplies, or binding agents to a Construction Material do not change the categorization of the Construction Material
- Items that consist of two or more of the listed Construction Materials that have been combined through a manufacturing process should be treated as Manufactured Products, rather than as Construction Materials
- Items that include at least one of the listed materials in the Construction Materials definition, combined through a manufacturing process with a material that is not listed, should be treated as Manufactured Products, rather than as Construction Materials
 - For example, a plastic framed sliding window should be treated as a Manufactured Product while plate glass should be treated as a Construction Material

Construction Materials (Cont'd)

- In the case of Construction Materials, "*Produced in the United States*" means all manufacturing processes for the Construction Material occurred in the United States
 - "Non-ferrous metals": All manufacturing processes, from initial smelting or melting through final shaping, coating, and assembly, must occur in the United States
 - "Plastic and polymer-based products": All manufacturing processes, from initial combination of constituent plastic or polymer-based inputs, or, where applicable, constituent composite materials, until the item is in its final form, must occur in the United States

Construction Materials (Cont'd)

- “Glass”: All manufacturing processes, from initial batching and melting of raw materials through annealing, cooling, and cutting, must occur in the United States
- “Fiber optic cable” (including drop cable): All manufacturing processes, from the initial ribboning (if applicable), through buffering, fiber stranding and jacketing, must occur in the United States. All manufacturing processes also include the standards for glass and optical fiber, but not for non-ferrous metals, plastic and polymer-based products, or any others
- “Optical fiber”: All manufacturing processes, from the initial preform fabrication stage through the completion of the draw, must occur in the United States

Construction Materials (Cont'd)

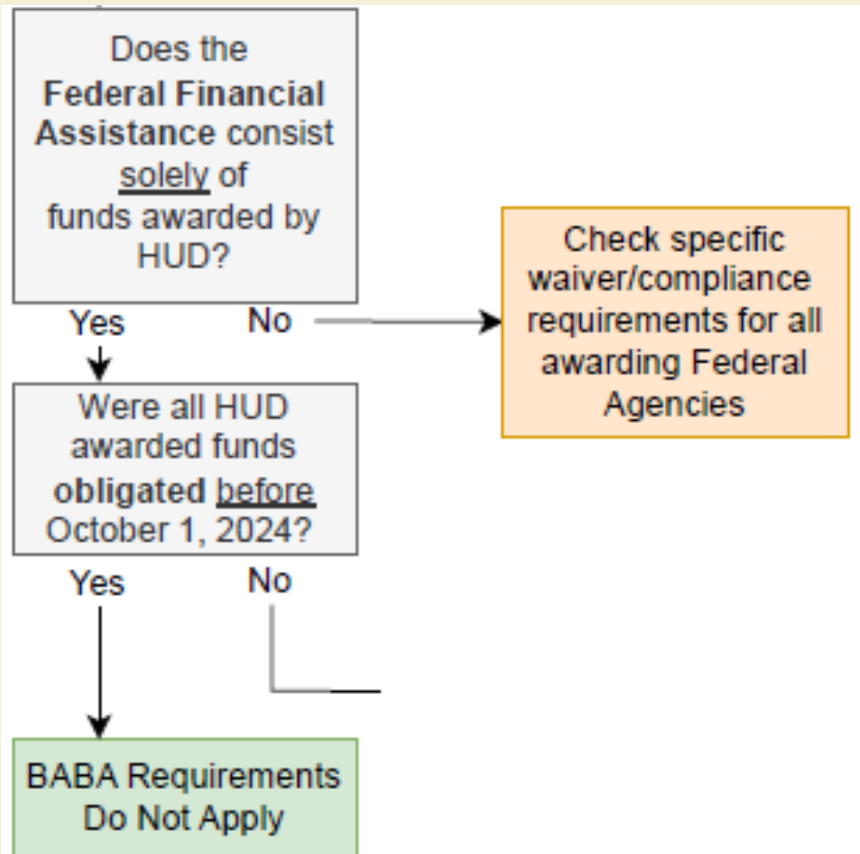
- “Lumber”: All manufacturing processes, from initial debarking through treatment and planning, must occur in the United States
- “Drywall”: All manufacturing processes, from initial blending of mined or synthetic gypsum plaster and additives through cutting and drying of sandwiched panels, must occur in the United States
- “Engineered wood”: All manufacturing processes from the initial combination of constituent materials until the wood product is in its final form, must occur in the United States

Section 70917(c) Materials: Cement, Stone, and Gravel

- “Section 70917(c) Materials” include cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives.
 - Section 70917(c) Materials are not subject to the BAP, these materials are not considered manufactured products when they are used or combined at a work site, such as wet concrete or hot asphalt mix
 - Section 70917(c) materials can be considered components of Manufactured Products if they are processed into a specific shape or form before being delivered to a work site
 - Precast concrete is considered a Manufactured Product and is therefore subject to BAP

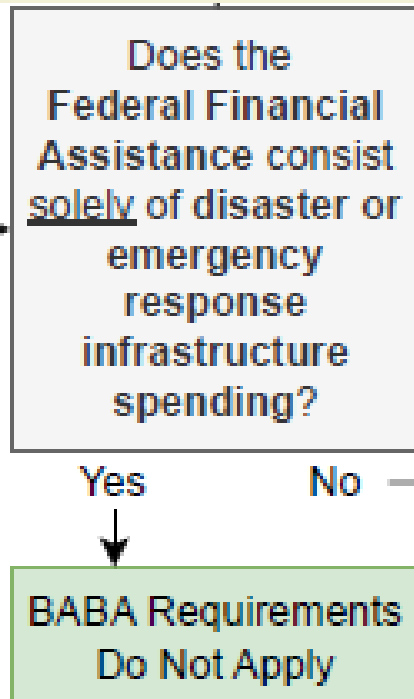
Other Federal Agency Requirements

- Reminder: If Tribes/TDHEs received FFA from HUD that was obligated before October 1, 2024, that FFA is exempt from BABA
- If receiving FFA from federal agencies, check for specific compliance for those agencies



Disaster and Emergency Response

- Funds used for disaster or emergency response infrastructure spending are not subject to BABA requirements



Disaster and Emergency Response (Cont'd)

- Funds used for disaster or emergency response infrastructure spending
 - BABA requirements do not apply to certain assistance authorized under the Robert T. Stafford Disaster Relief and Emergency Assistance Act relating to a major disaster or emergency declared by the President or pre- and post-disaster or emergency response expenditures.
 - BABA likely does not apply to ICDBG imminent threat grants
- Each time the TDHE receives federal funding, the TDHE staff should check with the granting official or grant contact to see if the grant qualifies as FFA subject to BABA

Complying with BABA Requirements

- Ensure that, for any Infrastructure Project funded by Federal Financial Assistance, all **Iron or Steel Products, Manufactured Products**, and **Construction Materials** are produced in the United States
- **Construction Materials** — "Produced in the United States" means all manufacturing processes for the Construction Material occurred in the United States, according to the following standards (*See 2 CFR § 184.6*):
 - **Non-ferrous metals**: All manufacturing processes, from initial smelting or melting through final shaping, coating, and assembly, occurred in the United States

Complying with BABA Requirements (Cont'd)

- Plastic and polymer-based products: All manufacturing processes, from initial combination of constituent plastic or polymer-based inputs, or, where applicable, constituent composite materials, until the item is in its final form, occurred in the United States
- Glass: All manufacturing processes, from initial batching and melting of raw materials through annealing, cooling, and cutting, occurred in the United States
- Optical fiber: All manufacturing processes, from the initial preform fabrication stage through the completion of the draw, occurred in the United States

Complying with BABA Requirements (Cont'd)

- Fiber optic cable (including drop cable): All manufacturing processes, from the initial ribboning (if applicable), through buffering, fiber stranding and jacketing, occurred in the United States.
 - All manufacturing processes also include the standards for glass and optical fiber, but not for non-ferrous metals, plastic and polymer-based products, or any others
- Lumber: All manufacturing processes, from initial debarking through treatment and planning, occurred in the United States
- Drywall: All manufacturing processes, from initial blending of mined or synthetic gypsum plaster and additives through cutting and drying of sandwiched panels, occurred in the United States
- Engineered wood: All manufacturing processes from the initial combination of constituent materials until the wood product is in its final form, occurred in the United States

Complying with BABA Requirements (Cont'd)

- Iron or Steel Products — "Produced in the United States" means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States
- Manufactured Products — "Produced in the United States" means:
 - 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% of the total cost** of all components of the Manufactured Product, unless another standard that meets or exceeds this standard has been established

Complying with BABA Requirements (Cont'd)

- If it is not feasible to obtain American-made Iron or Steel Products, Manufactured Products, and Construction Materials, the TDHE can try to obtain a project-specific BABA waiver
- Before beginning any FFA-funded Infrastructure Project, the TDHE should consider whether a general applicability waiver exists that might cover the project
- Examples include:
 - De Minimis Waiver: for a “De Minimis” portion of an infrastructure project, waiving BABA requirements for a cumulative total of no more than 5% of the total cost of the Iron or Steel Products, Manufactured Products, and Construction Materials, up to a maximum of \$1 million

Complying with BABA Requirements (Cont'd)

- Small Grants Waiver: for Infrastructure grants and expenditures for which the total cost is equal to or less than the current Simplified Acquisition Threshold (\$250,000) set in the Federal Acquisition Regulations (FAR) at 48 CFR part 2
- Exigent Circumstances Waiver: for “circumstances where undertaking the BABA-covered infrastructure project without delay is necessary to protect life, safety or provide necessary security to residents or community members, or to prevent the destruction of property”

Complying with BABA Requirements (Cont'd)

- Each federal agency may have different timelines, obligations, or applicable waivers under BABA
- Check applicable BABA requirements and guidance for each federal agency that provides Federal Financial Assistance for an Infrastructure Project
 - *(For the purposes of this training, we are focusing primarily on HUD's requirements)*

Overall Project Management

- Check for and **document BABA compliance** at each stage of an Infrastructure Project
- Ensure that BABA requirements are **considered during and incorporated into the design phase** for any project. If a contractor will be overseeing the design and construction contracts, the TDHE should ensure that the contractor takes these actions
- Monitor each stage of the Infrastructure Project, from the planning and design phase through the completion, to ensure that the Infrastructure Project complies with BABA

Contractor Procurement

- Ensure that project documentation, bid documents, and contracts clearly specify that the project is subject to BABA and what the BABA requirements are
 - Including BABA requirements in the bid process (in detail) will streamline implementation. It will help ensure that all parties are aware of and meet BABA requirements during design, construction, and recordkeeping

Contractor Procurement (Cont'd)

- Bid documents should include:
 - The definitions of the **three BABA materials** (*Iron and Steel Products, Manufactured Goods, and Construction Materials*), and what it means to be "Produced in the United States"
 - References to the BABA statute and regulations (BABA (Pub. L. 117–58, §§ 70941–70941); 2 CFR Part 184; 2 CFR §§ 200.322, and 200.327)
 - The requirement that manufacturers and suppliers will be responsible for providing individual BABA certifications for all of the **three BABA materials**
 - An outline of the documentation and records retention requirements

Contractor Procurement (Cont'd)

- Bid forms should describe the specific terms that will be in all contracts, including the requirements that a contractor must:
 - **Incorporate BABA requirements** into bid documents and contracts, and ensure that BABA requirements are implemented during the design phase
 - **Create and maintain thorough records** of BABA compliance
 - **Conduct market research** to identify and use American-made or produced Iron or Steel Products, Manufactured Goods, and Construction Materials
 - **Identify** any Iron or Steel Products, Manufactured Goods, and Construction Materials that are not domestically available

Contractor Procurement (Cont'd)

- **Create a cost comparison** between American-made and foreign-sourced materials if American-made materials are not available
- **Estimate costs** using American-made materials when available; identify any instances in which using American-made materials will increase the overall project cost by more than 25% **Identify time-sensitive project deadlines** that could be impacted if a product is delayed or not available domestically
- **Identify** instances in which non-availability or unreasonable cost waivers may be needed and provide the TDHE with the information required to draft such waivers

Contractor Procurement (Cont'd)

- **Notify the TDHE** when Iron and Steel Products, Manufactured Goods, and Construction Materials have **arrived on site** and are ready for installation
- **Inspect** all Iron and Steel Products, Manufactured Products, and Construction Materials delivered to the site **prior to installation**, to confirm that these materials meet the BABA requirements. This entails reviewing any country-of-origin markings on the product itself and obtaining and reviewing manufacturer's certification letters
- **Provide** all manufacturers' certifications to the TDHE
- **Only procure and install BABA-compliant** Iron and Steel Products, Manufactured Products, and Construction Materials (unless there is a relevant waiver in place)

Contractor Procurement (Cont'd)

- **Reject shipments** of any BABA non-compliant Iron and Steel Products, Manufactured Products, and Construction Materials and ensure that a subcontractor does not invoice the TDHE for BABA non-compliant items
- **Report any non-BABA compliant materials or subcontractors** to the TDHE
- **Sign a BABA certification letter** upon completion of the infrastructure project
- Bid forms should require bidders to submit a form stating that they are **familiar and will comply with the BABA requirements**, as laid out in the BABA statute and regulations (BABA (Pub. L. 117–58, §§ 70941–70941); 2 CFR Part 184; 2 CFR §§ 200.322, and 200.327)

Hypothetical

A TDHE plans to start constructing a low-income housing tax credit project in September 2024 using in part FY 2024 IHBG competitive funds. In August 2024, the TDHE enters into a contract with a construction manager to procure supplies for the project. In 2025, after the TDHE receives FY 2024 IHBG competitive funds, the construction manager purchases construction materials for the project. Do those construction materials need to comply with the BAP?

Answer

- Yes. BABA requirements apply to the **entire project**, if at least one part of the project is funded by Federal Financial Assistance
 - If a TDHE starts a construction project without the use of any BABA-covered Federal Financial Assistance, but the TDHE subsequently adds BABA-covered Federal Financial Assistance to the project, the entire construction project must comply with BABA
 - If a TDHE enters into a contract before September 30, 2024, and then adds BABA-covered Federal Financial Assistance, we recommend amending the contract to require BABA compliance

Contractor Procurement (Cont'd)

To locate a supplier that meets the BABA requirements, the TDHE may utilize the Hollings Manufacturing Extension Partnership supplier scouting federal website, located at:

<https://www.nist.gov/mep/supply-chain/supplier-scouting>

Contract Requirements

- Include BABA requirements in all **subawards, contracts, subcontracts, and purchase orders** for the work performed, or products supplied under the Federal Financial Assistance. 2 CFR § 184.4(b)
- Each subaward, contract, contract, and subcontract must also specifically require compliance with BABA (*Pub. L. 117–58, §§ 70941–70941*), *2 CFR Part 184*, and *2 CFR §§ 200.322, and 200.327*)

Contract Requirements (Cont'd)

- Design and Engineering Projects
 - For any projects involving design and/or engineering phases, the contract with the design contractor should state the responsibilities of the design contractor regarding compliance with BABA requirements. These include, but are not limited to:
 - **Incorporating** the BABA requirements into the project design;
 - **Researching** and **evaluating** the availability of American-made materials, and
 - **Evaluating** the suitability of domestically produced alternatives if only foreign-sourced materials are available

Contract Requirements (Cont'd)

- **Creating a cost comparison** between American-made materials and foreign-sourced materials if American-made materials are not available
- **Estimating costs** using American-made when available, highlighting any instances in which using American-made materials will increase the overall project cost by more than 25%; if so, creating a cost comparison between American-made and foreign-sourced materials
- **Identifying** instances in which non-availability or unreasonable cost waivers may be needed and providing the TDHE with the information required to draft such waivers

Contract Provisions

- If a project will involve subcontracts, include a provision in the primary contract requiring the primary contractor to ensure that all subcontractors comply with BABA
- The contract provision should further require the contractor to include a provision in every subcontract or purchase order that requires the subcontractor or vendor to comply with BABA (*Pub. L. 117–58, §§ 70941–70941, 2 CFR Part 184, and 2 CFR §§ 200.322, and 200.327*)
- The contracts should also require contractors and subcontractors to do the following:
 - Communicate BABA requirements in solicitations for bids from vendors for Iron and Steel Products, Manufactured Goods, and Construction Materials

Contract Provisions (Cont'd)

- Incorporate BABA requirements into bid documents and subcontracts, and ensure that BABA requirements are implemented during the design phase of the project
- Create and maintain thorough records of BABA compliance
- Conduct market research to identify and use American-made or produced Iron or Steel Products, Manufactured Goods, and Construction Materials
- Identify any Iron or Steel Products, Manufactured Goods, and Construction Materials that are not domestically available
 - Create a cost comparison between American-made or produced materials and foreign-sourced materials if American-made or produced materials are not available

Contract Provisions (Cont'd)

- Estimate costs using American-made or produced materials when available, and identify any instances in which using American-made or produced materials will increase the overall project cost by more than 25%
 - *if BABA compliance increases the cost by more than 25%, the TDHE can likely obtain a waiver*
- Identify time-sensitive project deadlines that could be impacted if a product is delayed or not available domestically
- Identify instances in which non-availability or unreasonable cost waivers may be needed and provide the TDHE with the information required to draft such waivers

Contract Provisions (Cont'd)

- Notify the TDHE when Iron and Steel Products, Manufactured Goods, and Construction Materials have arrived on site and are ready for installation
- Inspect all Iron and Steel Products, Manufactured Products, and Construction Materials delivered to the site prior to installation, to confirm that these materials meet the BABA requirements. This entails reviewing any country-of-origin markings on the product itself and obtaining and reviewing manufacturer's certification letters
- Provide all manufacturers' certifications to the TDHE

Contract Provisions (Cont'd)

- Only procure and install BABA-compliant Iron and Steel Products, Manufactured Products, and Construction Materials (unless there is a relevant waiver in place)
- Reject shipments of any BABA non-compliant Iron and Steel Products, Manufactured Products, and Construction Materials and ensure that a subcontractor does not invoice the TDHE for BABA non-compliant items
 - Report any non-BABA compliant materials or subcontractors to the TDHE
- Sign a BABA certification letter upon completion of the infrastructure project

Contract Provisions (Cont'd)

- Contracts and bidding documents should make clear that:
 - It is the **manufacturers'/suppliers' responsibility to inform the TDHE** if a BABA-compliant product initially promised by the manufacturer/supplier is no longer available within the established timeframe or in the required quantity to meet the project specifications and timeline
- Contracts should state that installation of materials or products that are not BABA-compliant shall be considered defective work.
- Bidding/Procurement documents should specify that vendors and manufacturers will be required to submit manufacturer's certifications of BABA-compliance

Procurement of Infrastructure Materials

- The TDHE or Contractor should **collect country-of-origin information** on all the materials and components of products
- Manufacturer's Certifications
 - The TDHE should require manufacturers and suppliers to **provide certifications demonstrating that the products comply with BABA requirements**
 - Contracts and purchase orders should **specify that manufacturers and suppliers will be responsible for providing individual BABA certifications** for each Iron and Steel Product, Manufactured Product, and Construction Material

Procurement of Infrastructure Materials (Cont'd)

- Each certification, regardless of product category, should include the following five elements:
 1. Project information (title and/or project number; location of project)
 2. Specific product description
 3. Location of manufacture (city and state)
 4. Citation of BABA requirements and assertion of BABA compliance
 5. Signature of an authorized representative (e.g., company representative, owner, product engineer)

Procurement of Infrastructure Materials (Cont'd)

- Certifications can also include the following:
 - Manufacturer product numbers
 - A narrative description of the product
 - The cost of the components of Manufactured Products that are mined, produced, or manufactured domestically and/or certifying that the total cost of the components of the domestic Manufactured Product is greater than 55% of the total cost of all components of the manufactured product

Procurement of Infrastructure Materials– Certifications

- Types of Manufacturers certifications
 - **Manufacturer’s Certification**
 - Provided by a **single manufacturer** who was responsible for all steps of the manufacturing process, certifying that the product was made domestically or
 - Provided by the **final manufacturer in a multi-manufacturer process** who is willing to certify the product’s BABA compliance
 - The manufacturer must include the name of all the manufacturers and locations where each step of manufacture was completed, and a short description of what the manufacturer did (e.g., melting, cutting, or fabrication)

Procurement of Infrastructure Materials – Certifications (Cont'd)

– Step Certification

- Each entity (e.g., supplier, fabricator, manufacturer, and processor) that contributes to manufacturing the products certifies that their individual “step” in the process was performed domestically

– Supplier Certification

- Suppliers can provide certifications if they know that the product was produced/manufactured domestically

– Mill Certification

- A quality assurance record of the physical and chemical properties of raw material (e.g., rebar and sheet metal)
- A mill certification can certify that the material complies with BABA

Hypothetical # 1

A TDHE receives three bid responses to a proposal. One bid is from an Indian-owned business that says they cannot comply with BABA (e.g., the business is small and they are unable to find BABA-compliant materials). Two bids are from non-Indian owned businesses that can comply with BABA within the project budget (e.g., a company such as Lowes that has the resources to make BABA compliance economically feasible). Which bidder must the TDHE choose?

Answer

BABA would require the TDHE to choose the non-Indian owned business. The TDHE will be unable to meet both the Indian preference requirements and the BABA requirements. HUD has indicated that under such circumstances, the BABA requirements will apply.

Hypothetical # 2

A TDHE used non-federal funding to procure and order Construction Materials for an Infrastructure Project. The TDHE then receives an FY 2025 IHBG grant to fund the project. The TDHE ordered the Construction Materials before receiving the IHBG grant, but those Construction Materials were not paid for or delivered until after the TDHE uses the IHBG grant for the project. Do those Construction Materials need to comply with the BAP?

Answer

Most likely not. HUD has informally indicated that it will not require a TDHE to retroactively apply BABA to materials already ordered. However, that approach could change with a new administration. If a TDHE anticipates receiving and using federal funding for a project, we recommend including BABA requirements in the project contracts ahead of time.

Construction Phase

- The TDHE should ensure and document that all products installed during the construction phase of an Infrastructure Project comply with BABA
- A TDHE should take the following steps (or require the contractor/subcontractor to take these steps):
 - Inspect all Iron and Steel Products, Manufactured Products, and Construction Materials delivered to the site prior to installation, to confirm that these materials meet the BABA requirements
 - This includes reviewing any country-of-origin markings on the product itself and obtaining and reviewing manufacturer's certification letters

Construction Phase (Cont'd)

- Only install BABA-compliant Iron and Steel Products, Manufactured Products, and Construction Materials (unless there is a relevant waiver in place)
- Record and retain all manufacturers' certifications
- Reject shipments of any BABA non-compliant Iron and Steel Products, Manufactured Products, and Construction Materials and ensure that any subcontractor/vendor does not invoice the TDHE for BABA non-compliant items
- Report any non-BABA compliant materials or subcontractors to the TDHE

Construction Phase (Cont'd)

- If a non-BABA-compliant material has already been installed, the contractor should immediately notify the TDHE
 - The TDHE must require the contractor to remove and return the foreign product, procure the equivalent domestically-produced product, and install it
 - The contractor should not charge for the labor to replace the product

Compliance Documentation

- The TDHE should obtain, create, and maintain thorough documentation to demonstrate BABA compliance on projects subject to BABA
- This includes maintaining documentation of each quote that the TDHE receives and whether or not the Iron or Steel, Manufactured Products, or Construction Materials comply with the BAP
- Retain documentation for at least 3 years, or for a longer record retention period specified in the federal funding award

Compliance Documentation (Cont'd)

Retain copies of the following:

✓ Bid Documents	✓ Subawards
✓ Contracts and Subcontracts	✓ BABA Product Certification
✓ Market research on product [un]availability	✓ Costs of domestic vs foreign products
✓ Price Quotes	✓ Contractor Approvals/Denials
✓ Product Approvals/Denials	✓ Any non-BABA compliant materials
✓ Contractors and Subcontractors	✓ Site visits
✓ Inspections	✓ Any other monitoring or oversight activities

Compliance Documentation (Cont'd)

- Documentation to retain for waivers:
 - BABA waiver requests and approvals, including supporting documentation
 - This information will vary depending on the waiver claimed by a tribes/TDHE, but may include:
 - Document actual costs (e.g., invoices) for products and materials
 - Quotes received for domestically produced products
 - Total project costs

Overview of Waivers

- Two types of waivers
 - General applicability (broad scope)
 - Project specific
- HUD General Applicability Waivers currently in effect:
 - Small grants waiver
 - De minimis waiver
 - Exigent circumstances

Overview of Waivers (cont'd)

- Project-Specific Waivers:
 - Public interest
 - Requiring the use of the American made product would be inconsistent with the public interest
 - Non-availability of materials
 - The product needed is not produced in the United States in sufficient quantities or of a satisfactory quality
 - Unreasonable Cost Waiver
 - The inclusion of a product made in America will increase the cost of the overall project by more than 25%
- A Tribe/TDHE may request a project-specific waiver from HUD and other federal agencies

FFA from Multiple Agencies

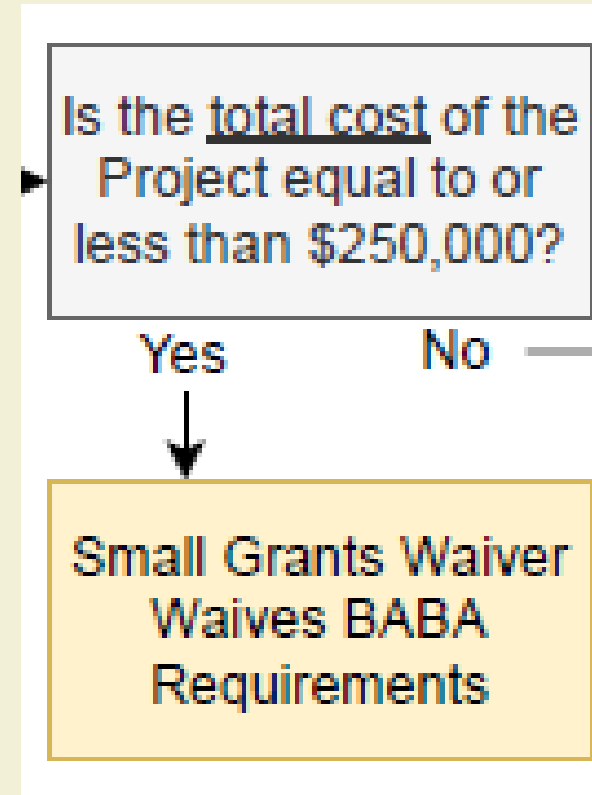
- General rule (currently): each federal agency must issue its own separate waiver for a project that is funded by more than one agency
- Under OMB's guidance, agencies can choose to follow a Cognizant agency approach:
 - The agency (e.g. HUD) with the greatest amount of funding in a project can take the lead on coordinating waivers across agencies
 - Agencies can consider issuing joint waivers with other agencies
 - However, each agency still must issue its own separate waiver
 - A waiver granted by one federal agency will not exempt the project from another federal agency's BABA requirements

FFA from Multiple Agencies

- If the TDHE receives Federal Financial Assistance from multiple federal agencies for the same project, the TDHE must check the waiver requirements and processes for each federal agency
- Each federal agency may have different BABA requirements, timelines, and waiver processes
- Under current OMB guidance, a waiver granted by one federal agency will not exempt the project from another federal agency's BABA requirements

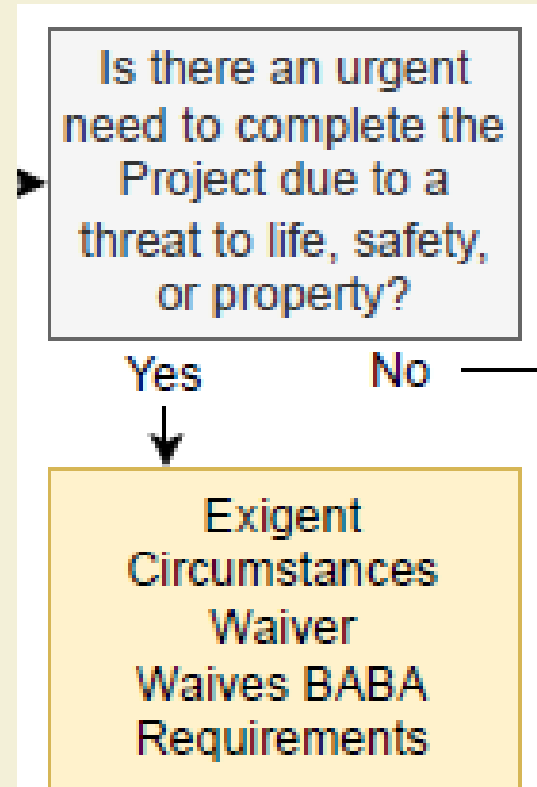
Small Grant Waiver

- Small Grants Waiver: waives BABA requirements for Infrastructure grants and expenditures for which the total cost is equal to or less than the current Simplified Acquisition Threshold (currently \$250,000)
- This threshold is set in the Federal Acquisition Regulations (FAR) at 48 CFR part 2



Exigent Circumstances Waiver

- Exigent circumstances: waives BABA requirements for “circumstances where undertaking the BAP-covered infrastructure project without delay is necessary to protect life, safety or provide necessary security to residents or community members, or to prevent the destruction of property”



De Minimis Waiver

- De Minimis Waiver: waives BABA requirements for a “De Minimis” portion of an infrastructure project, which is a cumulative total of no more than 5% of the total cost of the Iron or Steel Products, Manufactured Products, and Construction Materials, up to a maximum of \$1 million
- This waiver can be applied even in the absence of documented unavailability or high cost

De Minimis Waiver
Waives BABA
requirements for
materials that are less
than 5% of the total
cost of all covered
materials

Documenting Applicability of a General Waiver

- If the TDHE determines that the project qualifies for an existing general applicability BABA waiver(s), the TDHE should maintain documentation demonstrating how the project qualifies for the waiver

Applying for a Specific Waiver

- Federal Financial Assistance from Multiple Federal Agencies
 - If a TDHE has a project that is being funded by Federal Financial Assistance from multiple Federal Agencies, the TDHE should apply for a waiver through each agency
 - Cognizant agency approach: The agency with the greatest amount of funding in a project may take the lead on coordinating waivers across agencies
 - HUD ONAP recommends asking them for help coordinating multiple-agency waivers
 - However, a waiver granted by one federal agency will not exempt the project from another federal agency's BABA requirements

Applying for a Specific Waiver

- Process of Obtaining a BABA Waiver
 - Before submitting a BABA waiver request to a federal agency, the TDHE should first conduct market research to determine whether BABA-compliant Iron or Steel Products, Manufactured Products, or Construction Materials are available
 - The TDHE should prepare a waiver application using the HUD [BABA Waiver Request Form](#) or the waiver form available through the applicable federal agency

Applying for a Specific Waiver (Cont'd)

- The TDHE should submit the waiver application to the applicable federal agency
 - To submit a waiver to HUD, submit the waiver through HUD's [BABA Waiver Submission Site](#)
- The federal agency then publishes the waiver in the federal register for fifteen days for public comment
- After the public comment period, the federal agency submits the waiver request to OMB for approval
- After the public comment period, OMB decides whether to approve the waiver

Applying for a Specific Waiver (Cont'd)

- Contact the federal agency to see if they have guidance or technical assistance, as needed
 - For questions on a HUD grant, email HUD at BABAWaiver@HUD.gov with any waiver-specific questions or technical difficulties
 - The HUD Office of Native American Programs (ONAP) will have specific technical guidance available

Public Interest Waiver

- To apply for a **Public Interest Waiver**, the TDHE should include the following in the waiver application:
 - An explanation of how a waiver of the BABA requirement for the project or product serves the public interest
 - A detailed description of the definite impacts on the TDHE housing projects and Metlakatla Indian Community “if specific items, products, or materials are not utilized in an Infrastructure project”

Will BABA compliance be inconsistent with the public interest?

— Yes No

↓

Non-Availability of Materials Waiver

- The **Non-Availability of Materials Waiver** is available when BABA compliant materials are not available in sufficient and reasonably available quantities and quality
 - Note: if the total cost of these non-available materials is less than 5% of the project, you can avoid project specific waiver and use a de minimis waiver instead

Does the Project require materials that are not produced in the U.S. in sufficient and reasonably available quantities and/or quality?

— Yes

No



Non-Availability of Materials Waiver (Cont'd)

- To apply for a **Non-Availability of Materials Waiver**, the TDHE should include the following in the waiver application:
 - A detailed description of the steps that the TDHE has taken to conduct market research and how the TDHE has adequately considered alternative products that meet the definition of Made in America
 - A description of the due diligence that the TDHE “performed, including information, quotes, and/or responses from manufacturers, distributors, or suppliers”

Unreasonable Cost Waiver

- The **Unreasonable Cost Waiver** is available when compliance with BABA requirements would increase the total cost of a project by greater than 25%

Will BABA compliance increase the total cost of the Project by greater than 25%?

— Yes

No



Unreasonable Cost Waiver (cont'd)

- To apply for an **Unreasonable Cost Waiver**, the TDHE should include the following in the waiver application:
 - A description of how complying with BABA would increase the total project cost by more than 25%
 - A description of the additional cost of the BABA-compliant products
 - A comparison of the cost of the domestic product to the cost of the foreign product or a comparison of the overall cost of the project with domestic products to the overall cost of the project with foreign origin products or services

Unreasonable Cost Waiver (Cont'd)

- Other information as necessary to demonstrate how the BABA-compliant materials increase the total project cost by more than 25%
- The dollar amount to be waived
- Information demonstrating that there are no domestic alternatives that are available that are within the project budget

Procedures for Addressing Noncompliance

- Based on HUD guidance, a TDHE should develop and add in procedures for addressing situations in which a contractor, manufacturer, or supplier fails to comply with BABA
- If HUD develops specific guidance on how to address noncompliance, follow that guidance
- Until HUD develops specific guidance, TDHEs can follow the standard procurement procedures for addressing noncompliance:
 - Have a code of conduct
 - Develop procedures/policies describing the consequences for violations

What to Include in Procedures on Noncompliance?

- The procedures should state that installation of materials or products that are not BABA-compliant shall be considered defective work and a violation of the contract
- The procedures should stipulate the penalties, sanctions, and other remedies for violations/defective work

Any Questions?

Thank You