

## State of Georgia's Non-Entitlement Community Development Block Grant (CDBG) Program



## Build America, Buy America (BABA) CDBG Requirements

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### Build America, Buy America Summary

- Enacted in the Infrastructure Investment and Jobs Act signed by President Biden on November 15, 2021. Final rule issued for 2 CFR Parts 184 and 200.
- Requires that products purchased in connection with infrastructure projects funded by Federal financial assistance programs must be “produced in the United States”.
  - This requirement is known as the “Buy America Preference (BAP).”
- The following products used in Federally funded infrastructure projects must be produced in the United States:
  - Iron and steel;
  - Manufactured products; and
  - Construction materials.
- For the purposes of BABA, an infrastructure project is defined as any project that includes the following activities: Construction, Alteration, Maintenance, Repair.
- Infrastructure includes: Buildings and real property (including housing), utilities, water and sewer systems, electrical transmission facilities and systems, broadband infrastructure, transportation infrastructure.
- Non-construction materials or Section 70917(c) Materials - defined in 2 CFR 184.3 and means cement and cementitious materials: aggregates such as stone, sand, or gravel, or aggregate binding agents or additives. These materials are not considered “construction materials” for the purpose of BABA implementation.

### Produced in the United States as defined in 2 CFR 184.3

- 1) Iron or Steel Products** - all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.
- 2) In the case of manufactured products:**
  - a) The product was manufactured in the United States; and
  - b) The cost of 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 that meets or exceeds this standard has been established under applicable law or regulation for determining the minimum amount of domestic content of the manufactured product. See 2 CFR 184.2(a). The costs of components of a manufactured product are determined according to 2 CFR 184.5.
- 3) Construction Materials** - all manufacturing processes for the construction material occurred in the United States. See 2 CFR 184.6 for more information on the meaning of “all manufacturing processes” for specific construction materials.

### Applicability to CDBG Projects

Prior to funding, compliance with the Buy America Preference must be considered regarding the availability of products and the impacts of compliance on costs. Additionally, these considerations must be addressed on form DCA-5 of CDBG applications.

- Three (3) general applicability waivers are currently in effect for HUD programs and apply to all Covered CPD Programs. Each waiver is outlined below.
  1. **Phased Implementation** – Waiver published March 15, 2023, establishes a phased implementation schedule for application of the BAP to HUD programs. Funds obligated by HUD after November 14, 2022, are subject to the BAP.

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- a. **Iron and Steel** - BAP applies to iron and steel for CDBG projects awarded by DCA in 2023 and going forward.
  - b. **Specifically Listed Construction Materials** – BAP applies to “Specifically Listed Construction Materials” for CDBG projects awarded by DCA in 2024 and going forward. Specifically listed construction materials include; Metals other than iron or steel (non-ferrous metals), lumber, composite building materials, plastic and polymer-based pipes/tubes.
  - c. **All Other Construction Materials** – BAP applies to “all other construction materials” for CDBG projects awarded by DCA in 2025 and going forward. All other construction materials include: glass, drywall, and other construction materials
  - d. **Manufactured Products** – BAP applies to manufactured products for CDBG projects awarded by DCA in 2025 and going forward. Manufactured products are defined as a material or supply used in an infrastructure project that is not iron or steel or a construction material. When two or more materials are combined, they should be treated as a manufactured product.
2. **Exigent Circumstances** - BAP may be waived if projects must be completed immediately to protect life, ensure safety, or prevent the destruction of property. Effective until November 23, 2027
  3. **De Minimis, Small Grants & Minor Components** - BAP waived for projects with a total cost of \$250,000 or less. BAP waived for a de minimis portion that comprises no more than 5 percent of the total cost of covered materials used in a project, up to \$1 million. Effective until November 23, 2027

### General Compliance Requirements

CDBG Recipients must retain supporting documentation from subrecipients, contractors, and vendors to develop records demonstrating compliance with the BABA requirements on a project and material level basis, regardless of whether infrastructure is the primary purpose of the project.

- Documenting the Country of Origin
- Bidding Requirements
- Contract Requirements

### Documenting the Country of Origin

Recipients will ensure the products delivered to the construction site are accompanied by proper documentation demonstrating compliance with the law and made available to the funding authority upon request. The documentation may be received and maintained in hard copy or electronically. The use of a signed certification letter by the manufacturer for the project is the most direct and effective form of compliance documentation for ensuring products used on site are BABA-compliant prior to their installation; however, other forms of documentation are also acceptable if collectively, the following can be demonstrated:

- Documentation linked to the project. For example, this can be in the form of the project name, project location, contract number, or project number.

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- Documentation linked to the product used on the project. For example, description of product(s) (simple explanation sufficient to identify the product(s)), or an attached (or electronic link to) purchase order, invoice, or bill of lading.
- Documentation includes statement attesting that the products supplied to the assistance recipient are compliant with BABA requirement. Reference to the Infrastructure Investment and Jobs Act ("IIJA") or the Bipartisan Infrastructure Law (BIL) are also acceptable. For iron and steel items under BABA, references to the American Iron and Steel (AIS) requirements are also acceptable and reciprocal with BABA for such items.
- Documentation that manufacturing occurred in the United States, which could include, for example, the location(s) of manufacturing for each manufacturing step that is being certified. It is acceptable for manufactured products to note a single point of manufacturing, documenting that the final point of manufacturing is in the United States. Note that each BABA category may require different determinations for compliance
- Signature of company representative (on company letterhead and signature can be electronic). The signatory of the certifying statement affirms their knowledge of the manufacturing processes for the referenced product(s) and attests that the product meets the BABA requirements.

In addition to compliance documentation, Grantees or their representatives should also conduct a visual inspection of the product when it arrives to the project site, especially for iron and steel products which are often stamped with the country of origin.

**Note: A country of origin stamp alone is not sufficient verification of compliance with BABA and assistance receipts should not rely on it to ensure compliance.**

### Other Certification Methods for Iron & Steel

- Material Test Reports (MTRs, commonly referred to as "Mill Certifications" or "Mill Certs") provide the chemical composition of steel and iron from a mill or foundry. If an MTR accompanies the delivery of steel or iron to a project site with an invoice or bill of lading, it will be considered sufficient to demonstrate compliance (equivalent to a certification letter) as long as the MTR includes a manufacturer representative's signature in addition to the location (city and state) of the mill/foundry. It is common for MTRs to be the first letter in a "step certification" if the product is further fabricated or painted, etc., by another manufacturer.

## **Bidding Requirements**

### Advertisement for Bids

- This agreement is for services related to a project that is subject to the Build America, Buy America Act (BABAA) requirements under Title IX of the Infrastructure Investment and Jobs Act ("IIJA"), Pub. L. 117-58. Absent an approved waiver, all iron, steel, manufactured products, and construction materials used in this project must be produced in the United States, as further outlined by the Office of Management and Budget's Memorandum M-22-11, Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure, April 18, 2022.

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### Instructions to Bidders

- Any request for substitute or “or equal” shall include the Manufacturer’s Certification of compliance with the Build America, Buy America Act (BABAA) requirements mandated by Title IX of the Infrastructure Investment and Jobs Act (“IIJA”), Pub. L. 117-58. Include the following, in the Federal requirements section: BABAA requirements apply to this project.

**Please note: Country of Origin compliance documentation will be required prior to the drawdown of construction funds.**

### Bid Form

- Bidder’s representation section: Bidder is familiar with all laws and regulations that may affect cost, progress, and performance of the work, including BABAA requirements.

### **Contract Requirements**

- Compliance with BABA must be spelled out in agreements for services, construction contracts, and procurement contracts. Generally, the architect/engineer’s contract should include, as a basic service, obtaining and maintaining all BABA documentation (particularly manufacturers’ certifications) during construction, which shall be transferred to the recipient. The architect or engineer will need to certify to this action at the project’s end.
- At a minimum, the following must be included in all construction contract documents: All requirements of the Build America, Buy America (BABA) Act, 41 USC 8301 note, and all applicable rules and notices, as may be amended, shall be complied with if applicable to the infrastructure project. Pursuant to HUD’s Notice, “Public Interest Phased Implementation Waiver for FY 2022 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.
- Additionally, contractor construction contract(s) must include a requirement to procure and install only items that comply with BABA or are subject to an approved waiver. Contractors must provide manufacturers’ certifications for all BABA compliant items to the responsible party before a request for reimbursement to the agency is made. The contractor will be required to certify that all items used on the contract complied with BABAA and that all manufacturers’ certifications were provided.

### **Project Specific Waivers – Submission portal <https://babawaiver.hud.gov/s/>**

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 Made In America Office (MIAO). If more than one Federal agency is funding an infrastructure project, project-/product-specific waivers will require coordination among those Federal agencies prior to a determination by the MIAO. Please note, DCA CDBG Recipients’ wishing to submit a waiver must coordinate this with DCA, as only direct HUD Recipients may submit waiver applications. As such, waiver applications will not be accepted by HUD from DCA CDBG Recipients. If you think a project

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specific waiver is necessary, please contact DCA at [CDBG.Biz@dca.ga.gov](mailto:CDBG.Biz@dca.ga.gov). There are three (3) categories of waivers:

1. Public interest: BAP would be inconsistent with the public interest.
2. Nonavailability: covered materials are not produced in the US 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.

For HUD to consider a project/product-specific waiver the CDBG grantee must provide the following details as required by the MIAO:

- A detailed justification for the use of goods, products, or materials mined, produced, or manufactured outside the United States.
- A certification that there was a good faith effort to solicit bids for domestic products supported by terms included in requests for proposals, contracts, and nonproprietary communications with potential suppliers.
- Each proposed waiver should include the following information, as applicable:
  - Waiver type (nonavailability, unreasonable cost, or public interest).
  - Recipient name and Unique Entity Identifier (UEI).
  - Federal awarding agency organizational information (e.g., Common Governmentwide Accounting Classification (CGAC) Agency Code).
  - Financial assistance listing name and number
  - Federal financial assistance program name.
  - Federal Award Identification Number (FAIN) (if available).
  - Federal financial assistance funding amount.
  - Total estimated infrastructure expenditures, including all Federal and non-Federal funds (to the extent known).
  - Infrastructure project description and location (to the extent known).
  - List of iron or steel item(s), manufactured products, and construction material(s) proposed to be excepted from Buy America requirements, including name, cost, country(ies) of origin (if known), and relevant PSC and NAICS code for each.
  - A certification that the Federal official or assistance recipient made a good faith effort to solicit bids for domestic products supported by terms included in requests for proposals, contracts, and nonproprietary communications with the prime contractor.
  - A statement of waiver justification, including a description of efforts made (e.g., market research, industry outreach), by the Federal awarding agency and, and in the case of a project or award specific waiver, by the recipient, in an attempt to avoid the need for a waiver. Such a justification may cite, if applicable, the absence of any Buy America-compliant bids received in response to a solicitation.
  - Anticipated impact if no waiver is issued.
  - Any relevant comments received through the public comment period.

For general waiver inquiries, please contact: [CDBG.Biz@dca.ga.gov](mailto:CDBG.Biz@dca.ga.gov)

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**For more information on HUD's project specific waiver process, please refer to [Notice CPD-23-12: CPD Implementation Guidance for BABA's Domestic Content Procurement Preference as Part of the Infrastructure Investment and Jobs Act.](#)**