BABA / Buy America INDOT Q&A

1. What’s the difference between Buy America and BABA?
   * Buy America was the original rule with requirements for steel, iron, and manufactured products. Build America Buy America (BABA) supplements the original Buy America to add requirements for construction materials.
   * <https://www.ecfr.gov/current/title-23/chapter-I/subchapter-G/part-635/subpart-D/section-635.410>
   * <https://www.ecfr.gov/current/title-49/subtitle-B/chapter-VI/part-661>
   * <https://www.govinfo.gov/content/pkg/PLAW-117publ58/pdf/PLAW-117publ58.pdf> Title XI
2. Are non-reimbursable utilities required to comply with Buy America or BABA?
   * No. Buy America and BABA only apply to utilities eligible for reimbursement.
   * <https://www.fhwa.dot.gov/utilities/buyam.cfm> question 3
3. If the utility is reimbursable and must meet Buy America and BABA but is offering to pay for some of the items themselves and forgo reimbursement, would they still have to meet Buy America/BABA?
   * Yes. The key factor in determining requirement to meet is eligibility for reimbursement; it is not who ultimately pays.
   * <https://www.fhwa.dot.gov/utilities/buyam.cfm> question 4
4. If a utility does not meet the requirements for the general deminimis waiver but the utility cannot find an item that meets Buy America/BABA, can a project specific waiver be submitted?
   * INDOT is not entertaining the idea of project-specific waiver submittals. These waivers require substantial paperwork and must be submitted to the federal government which often requires a year review period and are still typically being denied. Ultimately INDOT is seeing utilities successfully being able to find compliant material when pushed.
   * <https://www.whitehouse.gov/wp-content/uploads/2023/10/M-24-02-Buy-America-Implementation-Guidance-Update.pdf> section VI
   * <https://www.fhwa.dot.gov/construction/contracts/buyam_qa_baba_post10232023.cfm> question 16
5. Are the deminimis waivers based on estimated costs at a certain time of the project or final actual costs? If final actual costs, what happens if the final is higher than the estimate and the items no longer meet the deminimis waiver?
   * This threshold is based on the actual cost of the steel, iron, manufactured products, and construction materials, not just the anticipated cost of those materials. Therefore, administering agencies should track the threshold amount to ensure that the threshold is not exceeded. If the threshold amount increases more than the lesser of 5% or $1,000,000 because of a change order, the administering agency must request and receive a waiver for all non-compliant construction materials incorporated into the project to be in compliance with Buy America and BABA. Again, INDOT’s stance is these project specific waivers are not a feasible option. If the estimates show nearing the deminimis threshold, it should be discussed with the project team as there is a large risk.
   * <https://www.fhwa.dot.gov/construction/contracts/buyam_qa_deminimis.cfm> question 4
6. If a utility is falling under existing general waivers such as the deminimis or manufactured products waiver, what must be submitted for this and to who?
   * There is no formal submittal or approval process for federal agencies or INDOT. The utility coordinator should keep sufficient documentation on their end to prove the materials met a waiver.
   * Source discussion between FHWA and INDOT.
7. The steel and iron deminimis waiver is based on the total contract cost. Does that include engineering and row and utilities? If the contract is only a part of a larger NEPA document, can it be based on the NEPA document’s total contracts cost?
   * Engineering, row, and utility costs can be included in the “total contract cost”. The total contract cost is the cost of that individual contract and not the larger NEPA document.
   * Source discussion between FHWA and INDOT.
8. If it is known certain materials will fall into an existing waiver such as deminimis and the utility coordinator documents accordingly, is there anything else needed? Does the utility need to submit a certificate showing where the material is from? Can the utility get material from wherever they want?
   * Nothing else is needed. The utility can obtain material from wherever they want and nothing needs submitted.
   * Source discussion between FHWA and INDOT.
9. At what point in the project/relocation process should Buy America/BABA material certificates be obtained by the utility coordinator?
   * Material certificates should be acquired at least prior to paying utility reimbursable invoices. Ideally, certificates should be acquired before the material is installed on a project.
   * <https://www.fhwa.dot.gov/construction/contracts/buyam_qageneral.cfm> question 39
10. Does the utility coordinator need to verify the material that actually gets installed on a project is what they obtained a certificate for and that the material being installed is compliant?
    * That is not the expectation. The utility coordinator can assume that if a material certificate is provided for a project and the utility tells the utility coordinator that is what was installed, they are telling the truth.
    * Source INDOT.
11. Can an item fall into multiple of the material type categories (ie it is steel/iron and manufactured product; steel/iron and construction material; or manufactured product and construction material)?
    * No. Each item only falls into one of those categories.
    * <https://www.fhwa.dot.gov/construction/contracts/buyam_qa_baba_post10232023.cfm> question 8
12. Does Buy America or BABA apply to construction equipment or items temporarily installed on the site such as trench boxes, concrete forms, or braces to be removed prior to completion?
    * No. Buy America and BABA only applies to material permanently incorporated into the project.
    * <https://www.fhwa.dot.gov/construction/contracts/buyam_qa_baba_post10232023.cfm> question 11
13. If there is no federal funding on an entire project, does Buy America or BABA apply.
    * Buy America still applies according to IC-5-16-8. BABA does not apply.
    * <https://statecodesfiles.justia.com/indiana/2015/title-5/article-16/chapter-8/chapter-8.pdf>
14. If there is federal funding for a certain phase of the project such as row or engineering but construction and/or utility relocation is not using federal funding, does Buy America or BABA apply?
    * Buy America and BABA apply for the entire project if federal funding is used on any portion of the project.
    * <https://www.whitehouse.gov/wp-content/uploads/2023/10/M-24-02-Buy-America-Implementation-Guidance-Update.pdf> page 4-5
15. Is there a specific form the utility/manufacturer must use for the Buy America/BABA material certificate?
    * No. As long as the certificate has the appropriate information, there is no official form to use. There is an example that may be utilized saved in UMS Template Library.
    * [https://www.ecfr.gov/current/title-49/subtitle-B/chapter-VI/part-661 part 661.6](https://www.ecfr.gov/current/title-49/subtitle-B/chapter-VI/part-661%20part%20661.6)
16. If utility relocation is being done work in contract, is the utility coordinator still responsible for obtaining Buy America/BABA material certificates?
    * No. The construction team will be responsible for obtaining all material certificates as part of our overall contract including utility work in contract materials.
    * Source INDOT.
17. What should be done with material Buy America/BABA certificates obtained by the Utility Coordinator.
    * All material certificates must be uploaded into UMS.
    * Source INDOT.
18. Are the deminimis waivers’ limits per utility or cumulative for the project as a whole? In other words, if the max cost of non-compliant steel that can be used for a project is $2,500 and one utility uses $1,000 of non-compliant steel, how much non-compliant steel can a second utility use?
    * The waiver limits are cumulative for the project as a whole. It also includes any non-compliant material used by INDOT’s primary roadway contract, although currently INDOT’s roadway contractors are instructed to only use compliant materials and never rely on deminimis waivers. The second utility would be able to use up to $1,500 of non-compliant steel. INDOT recommends material using this waiver be used on a most-needed/least available basis rather than first-come-first-serve basis.
    * Source discussions with FHWA and INDOT.
19. Can a utility provide a Buy America/BABA certificate that says all materials from the supplier are compliant rather than list each material for each project independently?
    * Yes. If a utility provides a supplier certificate that says all materials from that supplier are compliant and then explains which materials for a certain project are from that supplier, that is sufficient.