

**To:** CDBG Recipients, Engineers, and Grant Administrators

**From:** CDBG Division

**Effective Date:** May 11, 2024.

**RE:** Build America Buy America OCRA Policy

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### **Overview**

The Build America, Buy America (BABA) Act, which was included in the Infrastructure Investment and Jobs Act on November 15, 2021, established the Buy America Preference (BAP). This preference mandates that all iron, steel, manufactured products, and construction materials used in infrastructure projects funded with U.S. Department of Housing and Urban Development (HUD) financial assistance, including the Community Development Block Grant (CDBG), must be produced in the United States (U.S).

As defined in 2 CFR Part 184, an infrastructure project includes 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.

The Buy America Preference is not applicable to pre- and post-disaster or emergency response expenses. Projects that solely utilize funds designated for disaster and emergency response purposes as outlined in 2 CFR 184.8 are exempt from the BAP. These funds include Community Development Block Grant Disaster Recovery (CDBG-DR) and CDBG CARES Act (CDBG-CV) or any other emergency funding allocation.

HUD issued [FR-6331-N-06: Phased Implementation Waiver](#), which facilitates the implementation of the BAP requirements for the CDBG program. HUD's implementation schedule is based on the date when funds are obligated to the State of Indiana, Office of Community and Rural Affairs (OCRA).

### **Proposed Policy**

This Policy Notice establishes the Office of Community and Rural Affairs Build America, Buy America Act procedures and requirements for the State Community Development Block grant program.

#### **A) Phased Implementation Waiver Procedures**

Pursuant to HUD's Phased Implementation Waiver, the BABA will become effective when HUD has allocated new funding to OCRA. OCRA will inform stakeholders about the particular products that need to adhere to the BAP, based on OCRA's program year.

#### **B) HUD General Applicability Waivers**

HUD has made available four general applicability waivers for the CDBG program. These waivers offer temporary exemptions for CDBG projects from the BAP requirements. OCRA is adhering to the Public Interest Phased Implementation Waiver as outlined in Section A of this Policy Notice. OCRA will assess the applicability of the De Minimis and Minor Components Waiver, Exigent Circumstances Waiver, and Tribal Recipients Waiver to a CDBG project based on the grantee's eligibility or the specific nature of the project.

#### **C) Build America, Buy America Act Determination Analysis Process.**

Grantees must determine whether the Buy America Preference is applicable to their project when seeking federal funding from OCRA. OCRA's BABA Determination Analysis Form must be utilized by grantees to evaluate the applicability of the BAP in accordance with HUD [Notice CPD-23-12](#).

#### **D) Cognizant Agency Determination**

In accordance with [OMB M-24-02](#), the federal agency or pass-through agency that contributes the most funding to an infrastructure project as defined by 2 CFR Part 184 will be identified as the "Cognizant Agency". This designation standardizes waiver measures and adjudication processes, minimizing redundant efforts among federal agencies or pass-through agencies, and simplifying the process for grantees.

Grantees must, therefore, identify all federal or pass-through agencies that will provide match for a project and disclose the match amount(s) that will be provided by each source identified in the BABA Determination Analysis Form. OCRA will make the final determination of the 'Cognizant Agency' based on the funding allocated to the project from each identified federal funding source. If OCRA is designated as the "Cognizant Agency" then grantees must follow all of OCRA's BABA requirements as outlined in this Policy Notice.

If OCRA is the cognizant agency and a project-specific waiver is deemed necessary, OCRA will oversee the submission of the waiver and collaborate with other federal or pass-through agencies to communicate the proposed joint waiver. The proposed joint waiver will be submitted in accordance with the guidance and requirements outlined by the Made in America Office (MIAO) and the U.S. Department of Housing and Urban Development (HUD).

#### **E) Record-Keeping Requirements on a Project and Material Level Basis**

Grantees, grant administrators, subrecipients, and contractors must adhere to all BABA procedures and requirements. The following outlines the requirements for each step of a CDBG grant's administration.

##### **1) Readiness to Proceed (FEPS)**

Grantees must complete and submit the BABA Determination Analysis Form together with all other necessary Readiness to Proceed documentation, including financial, engineering, permits, and site control at FEPS for all CDBG awards.

##### **2) Pre-Release of Funds**

###### **a. Pre-Bid Conference**

Grantees' designated labor standards officer must cover BABA requirements at the mandatory Pre-Bid conference for CDBG funded infrastructure projects. The Pre-Bid conference should address the relevance of Buy America Provisions for each product type to ensure accurate information is utilized throughout the final design phase and procurement process. The labor standards officer must subsequently sign the Form 4: Pre-Bid Conference Guide Acknowledgment stating that all required information was provided at the meeting. The Pre-Bid Conference Guide Acknowledgment must be submitted to OCRA as part of Pre-Release of Funds.

###### **b. Bid-Opening Material**

Grantees must comply with the federal domestic procurement preference requirements of 2 CFR Part 184 and must ensure that BABA provisions are included in all OCRA infrastructure project bid advertisements. The necessary language for bid advertisements can be found in Form 17: Sample

Invitation for Bid Publication. Bid opening materials must be submitted to OCRA as part of Pre-Release of Funds.

**c. Pre-Construction Conference**

Before any work is performed, the selected contractor(s) must be advised of all Buy America Preference requirements, as outlined in the mandatory Pre-Construction Conference. Grant administrators are responsible for providing the necessary BAP information in accordance with the Pre-Construction Guide and any project-specific guidance provided by OCRA. Form 8: Pre-Construction Conference Acknowledgement Form must subsequently be completed.

Contractors who receive funds from OCRA for work completed on a CDBG infrastructure project must be aware that none of the funds provided under an OCRA award can be used for an infrastructure project unless the materials are produced in the United States, unless exempted by a waiver. Contractors must remain informed of HUD's [FR-6331-N-06: Phased Implementation Waiver](#).

Contractors are responsible for identifying all materials to be used in the infrastructure project and should make a sincere effort to procure domestic products. Documentation must be maintained for all materials used in the infrastructure project to ensure compliance with the BAP. Additionally, prime contractors must assume responsibility for ensuring that any subcontractors or lower-tier subcontractors also adhere to BAP by monitoring and incorporating the BAP provisions into the terms and conditions of all sub-contracts, and purchase orders related to CDBG infrastructure projects.

**3) Release of Funds**

Contractors must fill out and submit the Buy America Preference Self-Certification Form to confirm that the materials to be used in the project meet the BAP requirements. The contractor must have adequate information about the materials to be used in the CDBG federally funded project to accurately complete the form. Contractors are responsible for obtaining information about the name, quantity, price, country of origin, and relevant manufactured codes of the products to be used. Contractors must make the form available to the grant administrator in a timely manner to ensure compliance with the Release of Funds deadline.

If OCRA is not the designated cognizant agency, grantees must provide OCRA with a letter from the appropriate cognizant agency during the Release of Funds process. Grantees may utilize the available resources to obtain the letter from the relevant federal agency or pass-through agency that is responsible for ensuring BABA compliance.

**a. Executed Contracts**

Grantees are required to incorporate the Build America Buy America (BABA) provisions in the terms and conditions of CDBG transactions, including subrecipient agreements and prime contracts as outlined in the Federal and State Third Party Contract Provisions.

**4) Change Order**

During the implementation of a CDBG infrastructure project, if it is determined by the contractor that changes to the product are necessary, OCRA has outlined two types of change order requests.

**a. Material Modification**

If a grantee is in need of requesting a material modification to substitute Made in America products with other domestic products, the contractor must prepare and complete a material modification form and a new self-certification form to be submitted to OCRA.

**b. Substantial Material Modification**

If a grantee is unable to secure Made in America products after a sincere attempt has been made to obtain domestic products. The contractor is required to complete a substantial material modification form certifying that an attempt has been made to procure domestic products. The contractor must submit a new self-certification form for new materials that are not of domestic origin.

**F) Project Specific Waivers**

If OCRA deems that a substantial material modification request satisfies the criteria to begin the process of filing for a project-specific waiver, the Grantee and Grant Administrator are required to collaborate with OCRA to submit the required information to the U.S. Department of Housing and Urban Development (HUD) and the Made in America Office (MIAO) in order to initiate the waiver request. The waiver request must include a comprehensive written explanation and allow for a public comment period of at least 15 days, in accordance with Section 70914(c).

Before utilizing CDBG funding to purchase construction materials that are subject to the Buy American Provisions (BAP) and are not produced in the U.S., contractors must obtain approval from OCRA. Contractors are required to refrain from purchasing non-domestic materials until the grantee has obtained a direct and final determination from OCRA.

**Effective Date**

This policy is effective as of May 11, 2024, and will remain in effect until amended, superseded, or rescinded.