



BABA in Full Swing:

Practice Tips for Navigating the Build America, Buy America Act

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Readers of the PAHRA Monitor might recall first learning about the Build America, Buy America Act (“BABA” or the “Act”) in the Spring 2024 Edition, which included two articles describing the core mechanics of BABA and explaining some of the key terminology used in the Act. At that time, HUD was still rolling out BABA through its phased implementation plan which has since transitioned into full form. While the fog of uncertainty surrounding BABA’s real-world application and ultimate impact has not completely cleared, now is an excellent time to revisit the Act’s requirements and begin to make it a habitual consideration in your business plans going forward.

Applicability of BABA Going Forward

As of October 1, 2024, the start of HUD’s 2025 fiscal year, the phased implementation of BABA is complete so it must be a consideration of any project receiving Federal financial assistance (“FFA”) through HUD. FFA includes, and BABA thus applies to, grants and loans from HUD for the construction, alteration, maintenance, or repair of buildings and real property.¹ The requirements of BABA may then be pushed down to subrecipients of such funds², making familiarity with the Act critically important for parties at every level.

In short, if BABA applies to your project because you are receiving FFA from HUD (as described above), then you are required to adhere to the Buy American Preference (the “BAP”). The BAP is a “domestic procurement preference” that requires all iron, steel, manufactured products, and construction materials used in the project be produced in the United States.³ As you can imagine, complying with the BAP requires significant advance planning and coordination, which makes understanding its applicability essential and something which should be done as early as possible in the development process.

Practice Tips for Navigating BABA

With BABA now in full effect, below are some practice tips to consider as you navigate the development process for your projects in this new environment:

Don’t lose sight of when the FFA was obligated.

As discussed in detail in the Monitor’s Spring edition, the source of FFA and infrastructure/product element determine when BABA applies under HUD’s phased implementation schedule. For some sources and elements, BABA was triggered earlier this year or in prior years. For others, the waiver terminated August 23, 2024 or even as recent as October 1, 2024. As such, it is essential that you track which funds were received prior to the applicable phased implementation date, and which

¹ Section 70912(4) and (5) of the Act

² Note that the specific terms and conditions of certain FFA may not flow down to subrecipients, depending on the award. HUD’s online materials on BABA recommend that subrecipients consult with the original recipient of the FFA, as well as carefully reviewing the documents governing the FFA, to confirm applicability of the BAP.

³ Section 70912(2) of the Act

funds were received after that date, and that you understand the table set forth in HUD's Implementation Plan. Also note that if the FFA is provided by a Federal agency other than HUD, the FFA may be subject to BABA by virtue of that Federal agency's requirements and is not under HUD's waiver.⁴

Be mindful that most people are still learning BABA.

Given the recency of BABA's enactment and full implementation, be aware that many of the parties with whom you will be working might not have a well-rounded understanding of BABA and its applicability to your project. This is particularly important if someone is trying to apply BABA when it is not applicable (e.g., funds being used were obligated before the implementation of BABA) and/or a waiver applies or has been obtained. As you can imagine, compliance with BABA is a significant endeavor, so accurately determining its applicability to your project is something that should be clearly established and understood by all parties from the outset.

Carefully review the terms and conditions of your subaward documents to confirm the BAP actually applies.

The entities (such as state and local governments) receiving FFA subject to the BAP are required to notify subrecipients about the BAP requirements which flow through with the funds (unless a waiver is being applied).⁵ These initial recipients of FFA are required to include the BAP "in all subawards, contracts, and purchase orders for the work performed, or products supplied under the Federal award."⁶ In fact, such initial recipients are even responsible for ensuring that subrecipients of their FFA adhere to BABA and its requirements.⁷ As such, it is essential to carefully review the specific terms and conditions of the various agreements documenting your funding in order to assess whether the BAP applies.

Keep in mind that using FFA not covered by waiver will subject the entire project to BABA. Additionally, when FFA covered by a waiver is combined with other funding, the waiver may cease to apply.

If you have specific questions as you get deeper into a project, be sure to utilize HUD's online resources

HUD's website provides an array of resources aimed at educating the public about BABA, and there is a good chance that many of the questions you have as you learn about BABA can be found on the website.⁸ While the FAQ is quite expansive, questions can also be directed to your local HUD Field Office, as well as to BuildAmericaBuyAmerica@hud.gov (for general inquiries). HUD's website includes guidance relating to BABA's applicability, complying with BABA, waivers, and finding domestic suppliers, among other topics.

Always keep waivers in mind to see if they apply (the sooner the better)

As soon as it is determined that BABA applies to a project, it would be prudent to visit HUD's website and review whether any general applicability waivers apply or whether any project-specific waivers can be requested.⁹ While waivers were discussed in the Spring 2024 Edition of The Monitor, please see below for a quick summary of both the general and specific waivers, per HUD's website on this topic (which describes each in greater detail):¹⁰

- **General Waivers Currently in Effect for HUD Programs (in effect for 5 years from November 23, 2022, unless HUD publishes a notice altering the waiver period)**
 - **Small Grants** (total cost of the infrastructure project is equal to or less than \$250,000)
 - **De Minimis** (BABA requirements do not apply to a "De Minimis portion" of an infrastructure project, being at most 5% of the total cost of the manufacturing/construction materials, up to \$1,000,000)
 - **Exigent Circumstances** (the infrastructure project, as a result of exigent circumstances, must be completed immediately, or there is a threat to residents and the community of their life, safety, or property)

⁴ See HUD Final Notice on Public Interest Phased Implementation Waiver issued March 15, 2023 [Docket No. 6331-N-10A].

⁵ HUD's BABA Frequently Asked Questions (Question: "If I am a subrecipient of Federal Financial Assistance funding for infrastructure, does BABA apply?"), found at https://www.hud.gov/program_offices/general_counsel/build_america_buy_america/faqs

⁶ Id.

⁷ Id.

⁸ https://www.hud.gov/program_offices/general_counsel/build_america_buy_america

⁹ https://www.hud.gov/program_offices/general_counsel/build_america_buy_america/waiver

¹⁰ Id.

- **Specific Waivers You May Request**

- Public Interest (would be inconsistent with the public interest and have an impact on the community if certain materials/products are not used)
- Non-Availability (the item is not produced in the US at enough volume or at a satisfactory quality)
- Unreasonable Cost (compliance would increase the cost of the project by more than 25%)

Be aware that even maintenance projects may be subject to BABA.

BABA’s definition of “project” includes not just construction-related activities, but also activities related to maintenance and repair.ⁱ As such, if you have received FFA from HUD for maintenance work at a property, and such funds were received after November 14, 2022, then BABA will apply unless the application was waived.ⁱⁱ As a best practice, BABA’s potential application should be considered whenever there is work being done at a property, be it new construction or routine maintenance work. That said, it is worth noting that BABA does not apply to funds being used “for disaster or emergency response infrastructure spending, such as CDBG-DR grants.”ⁱⁱⁱ

Conclusion

In summary, BABA is here and its applicability must be considered from the outset of any deal receiving FFA from HUD. Although we are still very early in BABA’s life and plenty of uncertainty and questions remain, HUD has so far provided a variety of resources and guidance on the topic. However, while these educational materials are great to have as a resource, there is no substitute to understanding BABA at its core (particularly its waivers) and being able to confidently incorporate its compliance into your planning going forward.

ⁱ See Section 3, Question 3 of HUD’s FAQ, found at: https://www.hud.gov/program_offices/general_counsel/build_america_buy_america/faqs

ⁱⁱ See Section 2, Question 1 of HUD’s FAQ, linked above.

ⁱⁱⁱ From Section 2, Question 5 of HUD’S FAQ, linked above.

