



# Build America, Buy America Act (BABA) Virtual Training

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October 6-7, 2025



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# BABA Virtual Training

## Agenda

### DAY 1

- Overview and purpose of BABA
- Federal financial assistance subject to BABA
- Infrastructure projects subject to BABA
- Materials subject to BABA
- Waivers of BABA requirements

### DAY 2

- BABA Project Management Best Practices
- BABA requirements for procurements
- Required and recommended contract provisions
- Documentation of BABA compliance
- Dealing with non-compliance

# Overview of BABA

- BABA was enacted on November 15, 2021, as part of the Infrastructure Investment and Jobs Act.
- Establishes a domestic content procurement preference (“Buy America Preference” or “BAP”) for Federal Infrastructure programs.

# Overview of BABA (Cont'd)

- Buy America Preference (BAP) compliance:
  - Each Federal agency (e.g., HUD) must 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 all Federal agencies to ensure that any Infrastructure Project funded by Federal financial assistance complies with the BABA requirements.

## Overview of 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) regulates and enforces the BABA requirements through its Made in America Office (MIAO).

# Scope

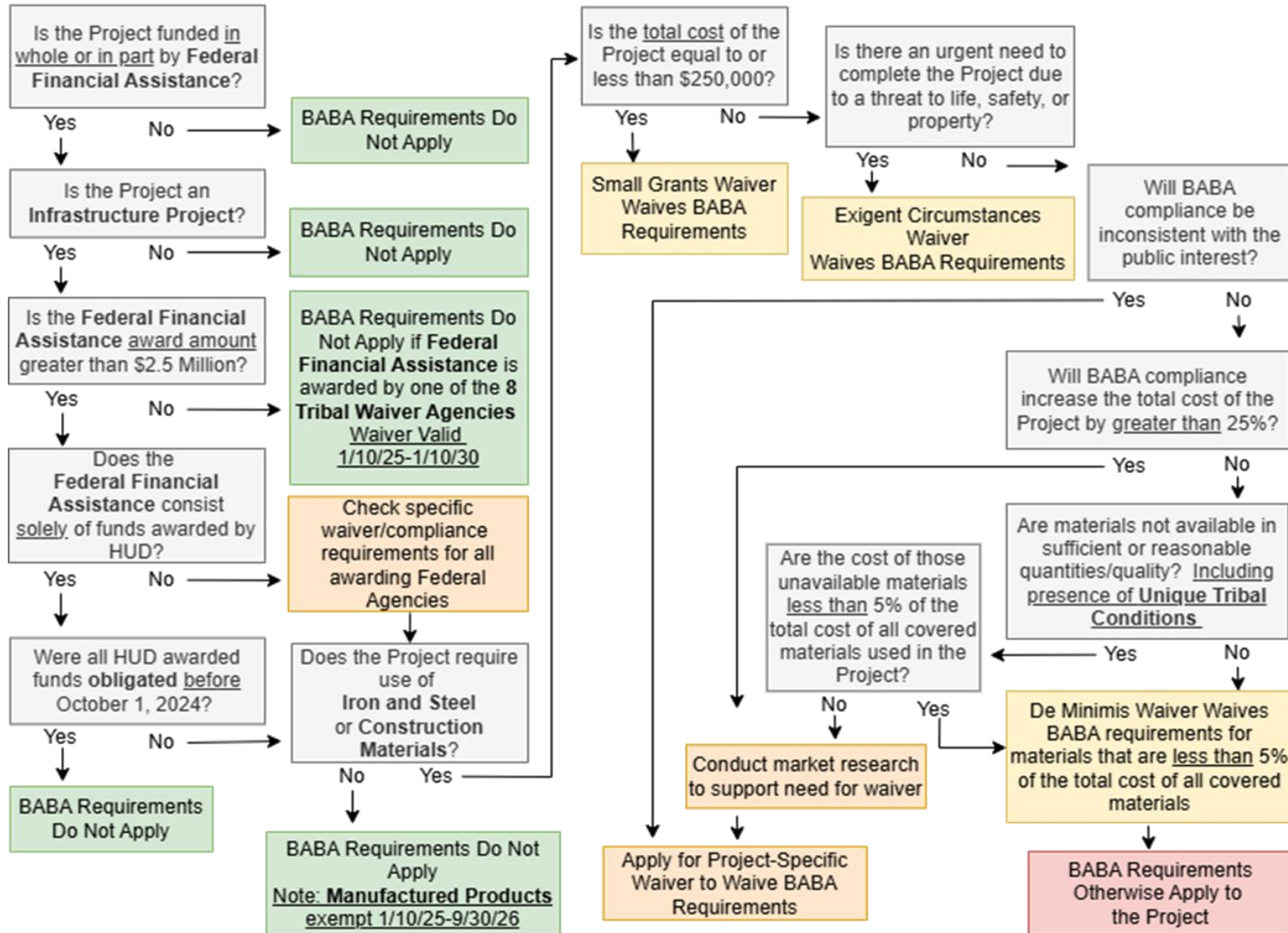
- The purpose of this technical assistance is to provide guidance on compliance with BABA.
  - We have designed this technical assistance based on existing laws, regulations, and guidance.
  - The technical assistance is based on taking a conservative approach to complying with BABA.



# BABA Procedures and Compliance Documentation

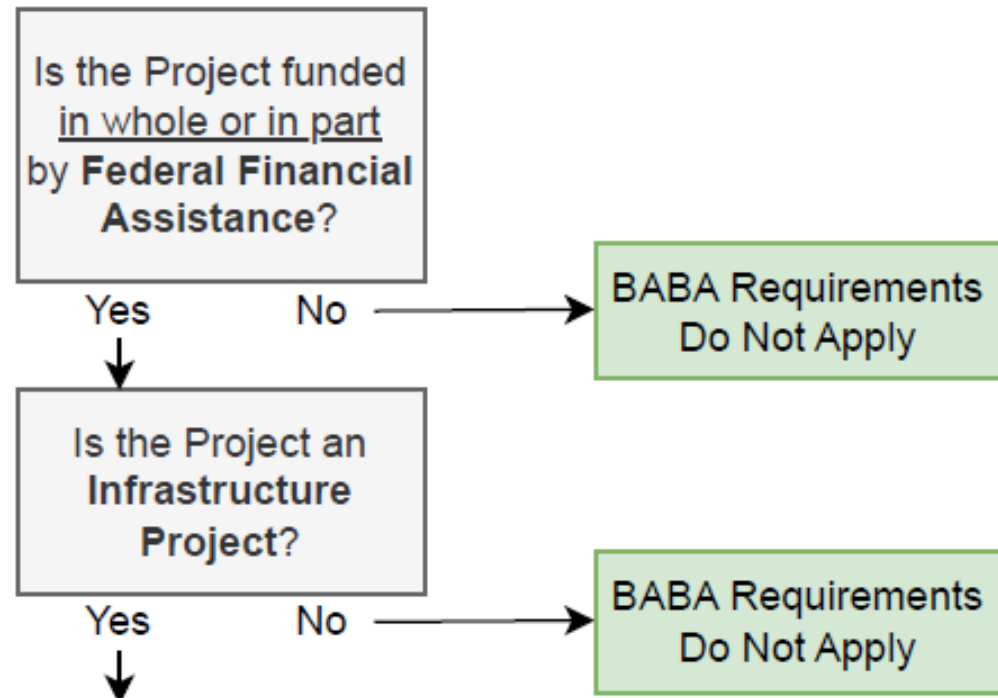
- Tribal Recipients should create procedures regarding BABA compliance, which should be updated to reflect current guidance and waivers.
- Tribal Recipients should obtain, create, and maintain thorough documentation to demonstrate BABA compliance.
- Retain documentation for at least 3 years, or for a longer period as specified in the federal funding award.

# How to Determine Applicability of BABA



# Applicability of BABA Requirements

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



# 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 Federal Financial Assistance Sources for Tribal Recipients

- BAP applies to common Federal Financial Assistance used for Infrastructure Projects, including, but not limited to:
  - Indian Housing Block Grant (IHBG) Formula
  - IHBG-Competitive (IHBG-COMP)
  - Indian Community Development Block Grant (ICDBG) Single Purpose
  - Native Hawaiian Housing Block Grant (NHHBG)
  - Title VI Loan Guarantees under the Native American Housing Assistance and Self-Determination Act of 1996 (Title VI)

# What Funding is Not Subject to BAP?

- The following types of funding are not Federal Financial Assistance and are not subject to the BAP:
  - Amounts received as reimbursement for services rendered to individuals.
  - Tribal HUD-Veteran Affairs Supportive Housing (Tribal HUD-VASH) program (since funding under Tribal HUD-VASH is specifically for rental assistance and associated administrative fees).
  - Section 184 Indian Housing Loan Guarantee program.
- Tribal Recipient staff should check with the granting official or grant contact to see if the grant is subject to the BAP.

# What Funding is Not Subject to BAP?

Types of funding not subject to BAP:

- Expenditures for assistance authorized in the Robert T. Stafford Disaster Relief and Emergency Act relating to a major disaster or emergency declared by the President, or
- Pre- and post-disaster or emergency response expenditures:
  - IHBG-Coronavirus Aid Relief and Economic Security Act (CARES)
  - IHBG-American Rescue Plan Act (ARP)
  - ICDBG-CARES
  - ICDBG-ARP
  - ICDBG-Imminent Threat (IT), in cases involving presidentially declared disasters or emergencies
  - NHHBG-ARP

# Partial Federal Financial Assistance Funding and Pass-Through Funding

- **Partial Federal Financial Assistance (FFA)**  
**Funding:** BAP requirements apply to the entire project if at least one part of the project is funded by Federal Financial Assistance.
- **Pass-Through Funding:** BAP requirements apply if the funding source includes FFA, regardless of whether it is a sub-award from a non-Federal agency.



# **Waivers Exempting Certain Federal Financial Assistance**

- **Multi-Agency Tribal BABA Waiver (2025)**
- **HUD Tribal Waiver (2022, Expired 2024)**

# Multi-Agency Tribal BABA Waiver

- On January 10, 2025, eight Federal agencies, including HUD and DOI, issued a final [General Applicability Public Interest Waiver to Indian Tribes](#). This Tribal BABA Waiver:
  - (1) Exempts awards and subawards to Tribal Recipients of \$2.5 million or less (for the life of the award) from BAP requirements for five years, until January 10, 2030.
    - The \$2.5 million threshold applies to *award amounts*, not *project amounts*.
    - This threshold applies to subawards to Tribal Recipients that are less than or equal to \$2.5 million, if the total prime award is in excess of \$2.5 million.

# Multi-Agency Tribal BABA Waiver (cont'd)

- The Tribal BABA Waiver also:
  - (2) Exempts manufactured products from BAP requirements between January 10, 2025 and September 30, 2026, regardless of the Federal award amount.
    - Tribal Recipients may use FFA funds to purchase manufactured products that are not made in the U.S.
    - But only if the FFA funds were obligated on or before September 30, 2026.
    - FFA funds can be used for non-U.S.-made manufactured products throughout the lifespan of the FFA funds, even if expended after the waiver expires.

# Multi-Agency Tribal BABA Waiver (cont'd)

- The Tribal BABA Waiver applies to non-Tribal entities to the extent a project is co-funded with an award/subaward to Tribal Recipients.
- The Tribal BABA Waiver creates a limited timeframe during which the BAP requirements would apply to awards that are obligated after September 30, 2024, and before January 10, 2025.
  - However, the Tribal BABA Waiver states that “[f]or Federal Financial Assistance issued prior to the effective date of the final waiver, the waiver would apply to funds not yet expended.”
  - That appears to mean that the BAP would only apply to funds obligated between September 30, 2024, and January 10, 2025 if the funds were expended during that same timeframe.

# HUD Tribal Waiver (Expired)

- HUD issued a Tribal waiver, waiving BAP requirements for all Tribal Recipients from 2022 through September 30, 2024.
  - BAP requirements do not apply to funds obligated by HUD to Tribal Recipients prior to September 30, 2024.
  - BAP requirements do apply to funds obligated by HUD to Tribal Recipients after October 1, 2024.
  - For ONAP grants, a grant is “obligated” on the date the award grant agreement is signed by the Area ONAP Administrator.

# Hypothetical #1

A Tribe receives Federal Financial Assistance (FFA) award in 2025 of \$3 million, and then uses \$1 million of that FFA to build a 10-unit apartment complex, where the TDHE is the general contractor.

Does the TDHE need to ensure that the project complies with BAP, even though the Tribe is the primary recipient of the funding?

# Hypothetical #1 – Answer

**Yes.**

1. First, the multi-agency tribal waiver \$2.5 million threshold applies to *award amounts*, not *project amounts*, so this threshold is surpassed and the waiver does not apply.
2. Second, the BAP requirements apply to all Federal Financial Assistance and do not distinguish between the end user of the Federal funds. BAP requirements apply so long as the funding is derived from a Federal agency, even if the funds are passed-through to another entity (*unless a particular section of the terms and conditions of the Federal award specifically indicates otherwise*).

## Hypothetical #2

A Tribal Recipient plans to use Tribal (nonfederal) funds to start the construction of a 15-unit apartment complex in November 2025 and then will add funds from its 2025 IHBG Competitive fund award of \$2.7 million to complete the project.

**Question:** After the Tribal Recipient adds the 2025 IHBG Competitive funds to the project, the Tribal Recipient procures construction materials for the complex using Tribal funds. Are those materials subject to the BAP?



## Hypothetical #2 – Answer

- **Yes.** After the Tribal Recipient adds the 2025 IHBG Competitive funds, to the project, the BAP applies to the entire project. Any covered materials (Iron, Steel, and Construction Materials) must be made in America, regardless of what funding is used to procure the materials.

# What is an Infrastructure Project?

- **“Infrastructure Project”** means any activity related to the construction, alteration, maintenance, or repair of infrastructure in the U.S. 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 BAP requirements to apply when the project will serve a public function.
  - For Tribal housing (for now): BAP requirements apply to projects involving the construction, maintenance, alteration, or repair of **buildings that contain 5 or more units** (multifamily housing projects).

# What is an Infrastructure Project?

- Examples of HUD-funded activities that **MAY be subject to BAP, if they serve a public use:**
  - Construction of public facilities and improvements (e.g., water and sewer facilities, streets, sidewalks, neighborhood centers)
  - Utility installation or improvements
  - Water systems (drinking water and wastewater)
  - Electrical transmission facilities and systems
  - Special economic development activities
  - Broadband infrastructure
  - Transportation infrastructure

# What is Not an Infrastructure Project?

- HUD-funded eligible activities **not subject to BAP under the current Tribal waiver:**
  - Single-family housing projects (buildings consisting of 1-4 dwelling units) are considered “private.”
    - This includes a project consisting solely of the purchase, construction, or improvement of a private home for personal use.
    - Onsite utilities and related activities for such single-family housing projects are also not subject to the BAP.

# What is Not an Infrastructure Project?

- “HUD-funded eligible activities **not typically subject to BAP**” include:
  - Acquisition of real property
  - Relocation and demolition
  - Public services
  - Shelter or public facility operating expenses
  - Supportive services
  - Short-term payments to prevent homelessness
  - Administrative activities supporting disaster and emergency response
  - Rental assistance
  - Down payment and mortgage assistance

# What is Included in a Project?

- Projects subject to the BAP 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 #3

Using an IHBG award of \$2.6 million, the Tribal Recipient intends to build a subdivision consisting of 10 single-family homes and 3 fourplexes.

Is the project subject to the BAP?

# Hypothetical #3 Answer

- **No.** The project does not serve a public function because it consists of residential buildings containing 1 to 4 dwelling units (a single-family housing project) that will be occupied for private use. The project, therefore, does not meet the criteria of Public Infrastructure and is not subject to the BAP.



## Hypothetical #4

Using an IHBG award of \$2.6 million, the Tribal Recipient intends to build a single apartment building consisting of 22 dwelling units.

Is the project subject to the BAP?

# Hypothetical #4 Answer

- **Yes**, the apartment building consists of 5 or more dwelling units. The apartment building falls under the BABA definition of a Public Infrastructure project because it is a multifamily housing project. **It is therefore subject to the BAP.**

## Hypothetical #5

The Tribal Recipient intends to use an FFA award of \$2.7 million from HUD to provide a public access road that leads to 10 single-family homes and 3 fourplexes, and the road will be used by the general public.

Is the road project subject to the BAP?

# Answer

- **Yes.** The project is a Public Infrastructure project because it includes expenditures to construct, alter, maintain, or repair a public road. Therefore, the public road falls is subject to the BAP.

# Materials Subject to BABA

- BAP requirements only apply to Iron or Steel Products, Construction Materials, and Manufactured Products.
- **NEW:** Tribal Recipients are exempt from BAP's application to Manufactured Products for FFA obligated Jan. 10, 2025 – Sept. 30, 2026.

# 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.
- BAP requires that these products be “*produced in the United States*” meaning all manufacturing processes, from the initial melting stage through the application of coatings, occur 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)

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



# Manufactured Products (Cont'd)

- The Multi-Agency Tribal BABA Waiver exempts the application of BABA requirements to Manufactured Products after **January 10, 2025**, for Tribal recipients.
- This is a short-term waiver – BAP requirements will apply to Manufactured Products on projects funded by FFA obligated after **September 30, 2026**.

# Construction Materials

- “Construction materials” include articles, materials, or supplies that consist of only one of the items listed below. If 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 are still a Construction Material.
- Items that consist of two or more of the listed Construction Materials combined through a manufacturing process is a Manufactured Product, not a Construction Material.
- Items that include at least one of the listed Construction Materials combined through a manufacturing process with a material that is not listed is a Manufactured Product, not a Construction Material.
  - 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.

# Construction Materials (Cont'd)

- “Optical fiber”: All manufacturing processes, from the initial preform fabrication stage through the completion of the draw, must occur in the United States.
- “Lumber”: All manufacturing processes, from initial debarking through treatment and planing, must occur in the United States.

# Construction Materials (Cont'd)

- “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 BABA, 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 BABA.



# Initial BABA Steps – Check for Waivers

- Before beginning any Financial Federal Assistance (FFA)-funded Infrastructure Project, consider whether a waiver might apply
- **Two types of waivers**
  1. General applicability– no need to apply for waiver
  2. Project specific – must apply for waiver
- Federal Financial Assistance (FFA) from Multiple Agencies:
  - If the Tribal Recipient receives FFA from multiple Federal agencies for the same project, the Tribal Recipient must check the waiver requirements and processes for each Federal agency.
  - Each Federal agency may have different BABA requirements, timelines, and waiver processes.

# General Applicability Waivers

- General applicability:
  - Multi-Agency Tribal BABA Waiver
  - HUD Waivers :
    - HUD Tribal Waiver (Expired)
    - Small grants waiver
    - De minimis waiver
    - Exigent circumstances

# Recap: Multi-Agency Tribal BABA Waiver

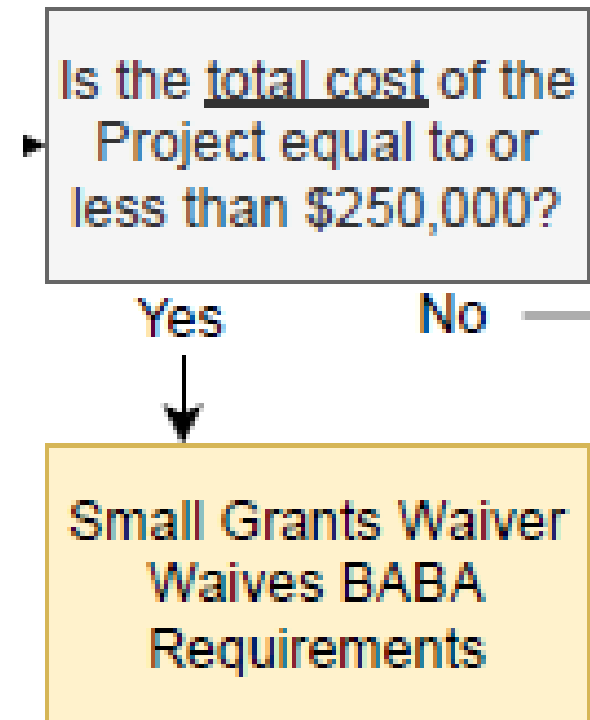
- Applies to eight Federal agencies, including HUD and DOI
- Exempts awards of \$2.5 million or less (for the life of the award) until January 10, 2030
- Exempts manufactured products from BAP requirements between January 10, 2025, and September 30, 2026, regardless of the Federal award amount

## Recap: HUD Tribal Waiver (Expired)

- HUD waived BAP requirements for Tribal Recipients, including Tribes and tribally designated housing entities (TDHEs), from 2022 through September 30, 2024.
  - BAP requirements do not apply to funds obligated by HUD to Tribal Recipients prior to September 30, 2024.
  - BAP requirements do apply to funds obligated by HUD to Tribal Recipients after October 1, 2024.
  - For ONAP grants, a grant is “obligated” on the date the award grant agreement is signed by the Area ONAP Administrator.

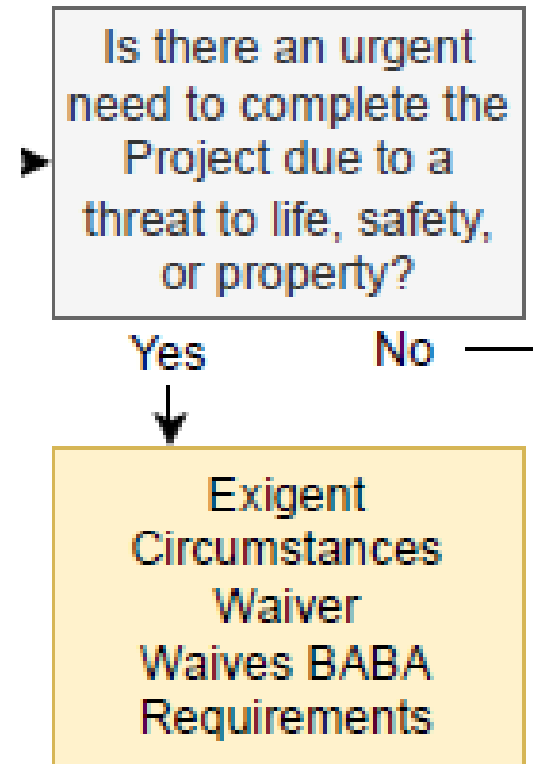
# Small Grants Waiver

- Small Grants Waiver: Waives BAP requirements for Infrastructure projects for which the total cost **(including HUD funding and funding from any other source)** 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 BAP 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 BAP 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 an Existing Waiver**

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

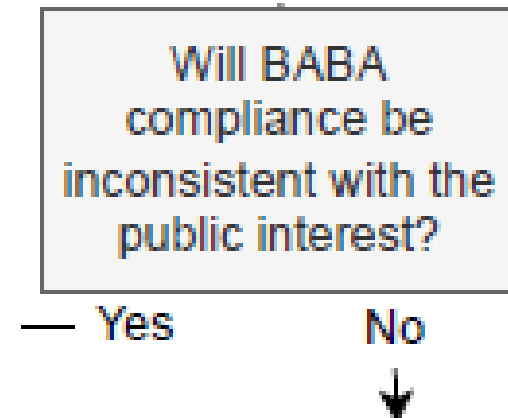


# Project-Specific Waivers

- **Project-Specific Waivers:** A Tribal Recipient may request a project-specific waiver from HUD and other Federal agencies.
  - Public Interest Waiver
  - Non-Availability of Materials Waiver
  - Unreasonable Cost Waiver

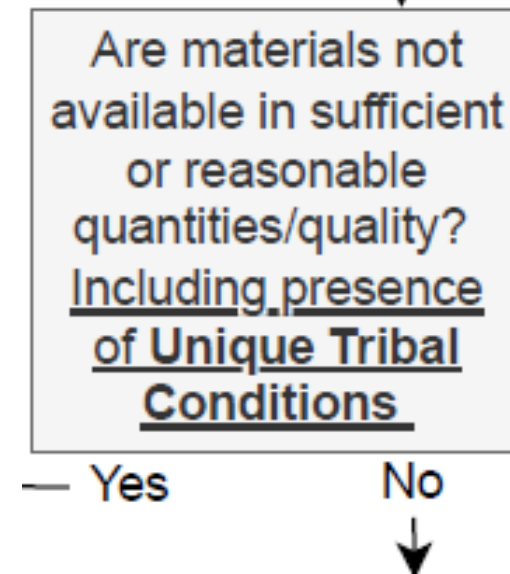
# Public Interest Waiver

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



# Non-Availability of Materials Waiver

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



# Non-Availability of Materials Waiver (Cont'd)

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

# Unique Tribal Conditions

- Tribal Recipients can apply for a **non-availability waiver** based on **unique tribal conditions** that restrict the availability of the American-made products:
  - **Short construction season/extreme weather or environmental conditions** make it impractical to purchase BABA-compliant materials in a timely manner.
  - **Shipping restrictions**, such as shipment by barge, air cargo, or other limited/extreme means of transportation, make it impractical to purchase BABA-compliant materials in a timely manner.

# Unique Tribal Conditions (cont'd)

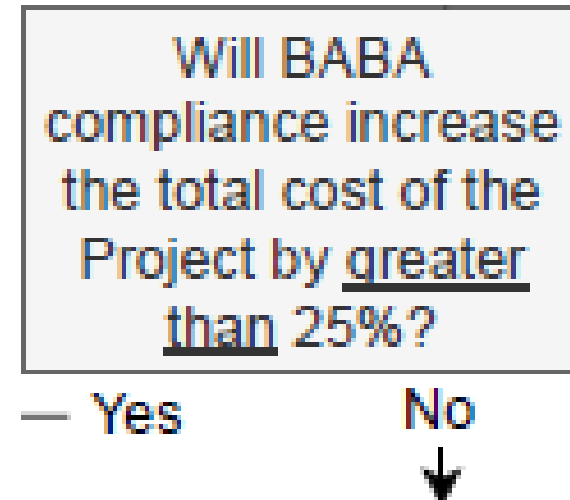
- Other non-availability waivers, based on unique tribal conditions:
  - **Lack of vendors** prevents effective access to BABA-compliant materials, where vendors will not ship the materials to remote locations, will not respond to material inquiries, or cannot provide cost estimates.
  - **Lack of contractors** prevents effective access to BABA-compliant materials, where, after repeated attempts, an insufficient number of bids were collected from available contractors due to BABA requirements.

# Unique Tribal Conditions (cont'd)

- Other non-availability waivers, based on unique tribal conditions:
  - **Compliance with Indian preference** (25 U.S.C. § 5307(b)) **or tribal preference** (e.g., 25 U.S.C. § 4111(k)) contracting requirements prevent compliance with the BAP, demonstrated by lack of qualifying bids received.
  - **Due to conditions beyond the control of the Tribal Recipient**, BAP-compliant material is not readily available.

# Unreasonable Cost Waiver

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





# Unreasonable Cost Waiver (cont'd)

- To apply for an **Unreasonable Cost Waiver**, the Tribal Recipient should include the following in the waiver application:
  - A description of how complying with the BAP would increase the total project cost by more than 25%.
  - A description of the additional cost of the BAP-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 BAP-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

# Applying for a Specific Waiver

- Federal Financial Assistance from Multiple Federal Agencies
  - If a Tribal Recipient has a project that is being funded by Federal Financial Assistance from multiple Federal Agencies, the Tribal Recipient 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 (Cont'd)

- Tribal Recipients should work with HUD regional points of contact (POCs) throughout the waiver request process:

AKONAP	EWONAP	NPONAP
Donald Perdue <a href="mailto:Donald.e.perdue@hud.gov">Donald.e.perdue@hud.gov</a>	Nathaniel Johnson <a href="mailto:Nathaniel.Johnson@hud.gov">Nathaniel.Johnson@hud.gov</a>	Roger Palmer <a href="mailto:Roger.D.Palmer@hud.gov">Roger.D.Palmer@hud.gov</a>
Katie Cruthers <a href="mailto:Katie.Q.Cruthers@hud.gov">Katie.Q.Cruthers@hud.gov</a>	Elton Jones <a href="mailto:Elton.Jones@hud.gov">Elton.Jones@hud.gov</a>	Michelle Rogers <a href="mailto:Michelle.B.Rogers@hud.gov">Michelle.B.Rogers@hud.gov</a>
Jarrett Griffith <a href="mailto:Jarrett.S.Griffith@hud.gov">Jarrett.S.Griffith@hud.gov</a>		
NWONAP	SPONAP	SWONAP
Angelique Adams <a href="mailto:Angelique.M.Adams@hud.gov">Angelique.M.Adams@hud.gov</a>	Lauren Rickman <a href="mailto:Lauren.N.Rickman@hud.gov">Lauren.N.Rickman@hud.gov</a>	Daniel Cox <a href="mailto:Daniel.R.Cox@hud.gov">Daniel.R.Cox@hud.gov</a>
Maya Urban <a href="mailto:Maya.N.Urban@hud.gov">Maya.N.Urban@hud.gov</a>	Darrell Powell <a href="mailto:Darrell.L.Powell@hud.gov">Darrell.L.Powell@hud.gov</a>	Sarah Olson <a href="mailto:Sarah.D.Olson@hud.gov">Sarah.D.Olson@hud.gov</a>
	Virginia Fredman <a href="mailto:Virginia.L.Fredman@hud.gov">Virginia.L.Fredman@hud.gov</a>	

# Applying for a Specific Waiver (Cont'd)

- Process of Obtaining a BABA Waiver
  - Before submitting a BABA waiver request to a Federal agency, the Tribal Recipient should first conduct market research to determine whether BAP-compliant Iron or Steel Products, Manufactured Products, or Construction Materials are available.
  - The Tribal Recipient 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 Tribal Recipient 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](#)
- For HUD waivers, the request will undergo initial review by the HUD Office of the Chief Financial Officer (OCFO), Office of General Counsel (OGC), and Office of Native American Programs (ONAP).
  - The request could be declined or additional information requested during any of these initial reviews.
  - Regional POCs will not be notified of such determinations, so Tribal Recipients should contact the regional POC for assistance in correcting requests, clarification, and navigating the BABA request system.

# Applying for a Specific Waiver (Cont'd)

- The Federal agency will publish the waiver in the *Federal Register* for 15 days for public comment.
  - For HUD waiver requests, the public comment notice will be published only after approval from HUD OCFO, OGC, and ONAP.
- After the public comment period, the agency will submit the waiver request to OMB for final waiver determination.

# Day 2

## BABA Virtual Training

- BABA Project Management
- BABA requirements for procurements
- Required and recommended contract provisions
- How to manage and implement a BABA-compliant project
- Documentation of BABA compliance
- Dealing with non-compliance
- Best practices



# Receipt of an Award

- Once a Tribal Recipient receives a federal funding award, these are questions to ask:
  - Does the award qualify as Federal Financial Assistance subject to BABA compliance?
  - Does a general applicability BABA waiver apply to the award?
  - Does the Tribe/TDHE need to build up staffing capacity to manage a BABA project?
  - What project(s) are a good fit for use of the award?

# Managing a BABA Project – Initial Steps

- Determine whether the project is an Infrastructure Project.
- Before beginning any Federal Financial Assistance-funded Infrastructure Project, consider whether a general applicability waiver exists that might cover the project.
- If it is not feasible to obtain American-made Iron or Steel Products, Manufactured Products, or Construction Materials, the Tribal Recipient can try to obtain a project-specific BABA waiver.

# Managing a BABA Project – Initial Steps (Cont'd)

- **Multi-Agency Tribal BABA Waiver**
- **HUD's general applicability waivers include:**
  - HUD Tribal Waiver (Expired)
  - De Minimis Waiver
  - Small Grants Waiver
  - Exigent Circumstances Waiver
- **The above waivers automatically apply if the project fits the requirements of the waiver**
  - A Tribal Recipient does not need to apply for these waivers.
  - A Tribal Recipient must still maintain documentation of how the project fits the waiver.

## Hypothetical #7

The Tribal Recipient intends to use FFA award of \$3.8 million to build a community center and playground immediately adjacent to the 10 single-family homes and 3 fourplex subdivision. The community center and playground are intended to be used primarily by Tribal members for gatherings and cultural events. The contract for the construction of the community center and playground, including Covered Materials, exceeds \$250,000.

Is the project subject to BAP?

# Hypothetical #7 Answer.

- **Yes**, the community center and playground are considered a Public Infrastructure Project and **are subject to the BAP.**

## Hypothetical #8

Using an FFA HUD award of \$2.5 million, the Tribal Recipient intends to build a large multi-purpose building on its reservation in which it intends to house a health and nutrition clinic and a daycare center that are intended to be used primarily by Tribal members and members of other Tribes. The project includes the multi-purpose building, a four-mile access road connecting the State highway and the facility's parking lot, and utility lines (electric, water and sewage) connected to the main lines running along the highway.

Is the project subject to BAP?

# Hypothetical #8 Answer

- **No.** While this is a Public Infrastructure project because it includes expenditures to construct infrastructure, **the award is \$2.5 million, so the BAP does not apply due to the Multi-Agency Tribal BABA Waiver.**

# Overall Project Management

- **Check applicable BABA guidance** for each federal agency that provides Federal Financial Assistance for an Infrastructure Project
- 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 Tribal Recipient 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



# Architect/Engineer & Contractor Procurement

- Each bid package, subaward, contract, subcontract, purchase order, etc., should specifically require compliance with BABA and explain the BABA requirements.
- Bid packages 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)

# Architect/Engineer & Contractor Procurement

- Bid packages should also:
  - Include the requirement that manufacturers and suppliers will be responsible for providing individual **BAP certifications** for all of the three BABA materials
  - Provide an outline of the documentation and records retention requirements
  - Describe the specific terms that will be in all contracts (we will cover this in a bit)

# Architect/Engineer & Contractor Procurement

- Bid packages should also:
  - 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)
- Bidding/Procurement documents should specify that vendors and manufacturers will be required to submit manufacturer's certifications of BABA-compliance

# Contract Requirements

- **For projects with design/engineering phases:** the contract with the architect/engineer should list their BABA responsibilities, which include designing a project to be compliant with the BAP
- **All contracts** should require the architect/engineer/contractor to:
  - **Incorporate BABA requirements** into the project design
  - **Conduct market research** to find U.S.-made materials
  - **Identify** any covered materials that are not domestically available

# Contract Provisions

- Contracts should also require the contractor to:
  - **Identify** time-sensitive project deadlines that could be impacted if a product is not available domestically
  - **Evaluate** the suitability of U.S.-produced alternatives if only foreign-sourced materials are available
  - **Estimate costs** using U.S.-made materials, highlighting cases in which using U.S.-made materials will increase the overall project cost by more than 25%; if so, **create a cost comparison** between U.S.-made and foreign-sourced materials

# Contract Provisions

- Contracts should also require the contractor to:
  - **Identify** instances in which non-availability or unreasonable cost waivers may be needed and provide the Tribal Recipient with the information required to draft such waivers
  - **Notify** the Tribal Recipient when materials have arrived on site
  - **Inspect all covered materials** prior to installation, to confirm BAP compliance
  - **Provide all manufacturers' certifications** to the Tribal Recipient

# Contract Provisions (Cont'd)

- Contracts should also require the contractor to:
  - **Only install BAP-compliant** materials
  - **Reject shipments** of any BAP non-compliant materials and ensure that a subcontractor does not invoice the Tribal Recipient for non-compliant items
  - **Report any non-BABA compliant materials** or subcontractors to the Tribal Recipient
  - **Sign a BABA certification** upon completion of the project
  - **Create and maintain** thorough records of BABA compliance

# Contract Provisions (Cont'd)

- Contracts/bid documents should make clear that it is the manufacturers'/suppliers' responsibility to inform the Tribal Recipient if a BAP-compliant product initially promised is no longer available
- Contracts should state that installation of materials that are not BAP-compliant is considered defective work.



# Contract Provisions – Subcontracts

- If a project will involve subcontracts, the primary contract should include provisions that require the primary contractor to:
  - Ensure that all subcontractors comply with BABA
  - Include a provision in every subcontract or purchase order that requires the subcontractor or vendor to comply with BABA
  - Incorporate BABA requirements into subcontracts, and ensure that BABA requirements are implemented during all phases of the project

# BABA Responsibility Matrix

- Tool for tracking and assigning BABA project management responsibilities

BUILD AMERICA, BUY AMERICA ACT (BABA) RESPONSIBILITY MATRIX															
Position/Name	Federal Award Receipt		Project Planning and Contractor Procurement				Project Design and Materials Procurement			Project Construction				Post Construction	
	Determine whether BABA applies to an award	Determine capacity needs for BABA project management	Determine whether BABA applies to the project	Apply for and/or document use of any BABA waiver(s)	Ensure RFPs include appropriate BABA language	Ensure contracts include appropriate BABA language	Ensure project design elements incorporate BABA compliance	Ensure purchase orders and subcontracts include BABA compliance	Document price quotes and/or non-availability of BABA compliant materials	Inspect materials and document BABA compliance prior to installation	Ensure any change orders and additional procurements comply with BABA	Collect all BABA compliance documents and certifications	Document and address any BABA non-compliance	Collect and retain all BABA-related documents	Report/respond to federal agency(s) regarding BABA compliance
Grants Administrator	X													X	X
Executive Director		X											X		
Project Manager			X	X				X	X			X	X		X
Architect/Engineer							X								
General Contractor										X	X				
Legal					X	X		X							

## Hypothetical #9

A Tribal Recipient will use Tribal (nonfederal) funds to start a Public Infrastructure Project in January 2026 and then plans to add \$500,000 of its 2025 IHBG Competitive award of \$3 million to the project later.

- Before the Tribal Recipient receives the 2025 IHBG Competitive funds, the Tribal Recipient enters into a contract with a construction manager to manage the project.
- After the Tribal Recipient receives FY 2025 IHBG competitive funds, the construction manager purchases iron for the project. Does the construction manager need to make sure that the iron complies with BAP?

## Hypothetical #9 Answer

- Yes. BAP requirements apply to the **entire infrastructure project**, as soon as at least one part of the project is funded by Federal Financial Assistance (FFA).
  - If a Tribal Recipient starts an infrastructure project without the use of any BAP-covered FFA, but then subsequently adds BAP-covered FFA to the project, the entire project must comply with the BAP.
  - If a Tribal Recipient expects to add BAP-covered FFA to an infrastructure project, it is best to make sure that all contracts require BAP compliance.

# Procurement of Infrastructure Materials

- When procuring materials for Infrastructure Projects, make sure the materials were made in America.
- Check the OMB website for existing materials waivers:  
<https://www.madeinamerica.gov/waivers/>
  - These are already approved waivers for specific materials that OMB has determined are not available in the U.S.

# Infrastructure Materials Procurement

To locate a supplier that meets the BAP requirements, the Tribal Recipient may utilize the Hollings Manufacturing Extension Partnership supplier scouting Federal website, located at:

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

# Procurement of Infrastructure Materials

- HUD and other Federal agencies will require Tribal Recipients to **provide documentation** showing that the materials were made in America.
- Contracts/purchase orders should specify that **manufacturers and suppliers will be responsible for documentation** that each Iron and Steel Product, Manufactured Product, and Construction Material was made in America.
- The Tribal Recipient and/or Contractor should **collect country-of-origin information** on all the materials and components of products.

# Procurement of Infrastructure Materials Documentation

HUD has provided a list of examples of acceptable documentation showing that materials were made in America (See HUD ONAP Notice PIH 2024-35):

- A Made in America or other label indicating the materials were made in the U.S.
- Materials specifications that provide sufficient detail to conclude that the materials were made in the U.S.
- A certificate or other documentation from the manufacturer or reseller demonstrating that the materials were made in the U.S.



# Procurement

## Acceptable Documentation

Other types of acceptable documentation (See HUD ONAP Notice PIH 2024-35):

- A signed certification by the contractor of an Infrastructure Project certifying “to the best of his/her knowledge and belief, all Iron, Steel, Manufactured Products, and Construction Materials installed on the project by the contractor and by any and all subcontractors and suppliers for the project comply with the Build America, Buy America Act (BABA) requirements of the Infrastructure Investment and Jobs Act of 2021 (Pub. L. 117- 58, §§ 70901-70953), or are the subject of a waiver approved by the Secretary of Housing and Urban Development or designee” and

# Procurement

## Acceptable Documentation (Cont'd)

Other types of acceptable documentation (See HUD ONAP Notice PIH 2024-35):

- A signed certification from the manufacturer of the Covered Materials certifying “to the best of his/her knowledge and belief the Covered Materials comply with the Build America, Buy America Act (BABA) requirements of the Infrastructure Investment and Jobs Act of 2021 (Pub. L. 117- 58, §§ 70901-70953), or are the subject of a waiver approved by the Secretary of Housing and Urban Development or designee.”

# Procurement of Infrastructure Materials

## Certifications

- **Manufacturer's Certifications:** 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 BAP requirements and assertion of BAP compliance
  5. Signature of an authorized representative (e.g., company representative, owner, product engineer)

# Procurement of Infrastructure Materials

## Certifications (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 (Cont'd)

- 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 BAP.

## Hypothetical #10

A Tribal Recipient receives three bid responses to a proposal. One bid is from an Indian-owned business that says they cannot comply with the BAP (e.g., they are unable to find BAP-compliant materials that are economically feasible due to their small business size). Two bids are from non-Indian owned businesses that can comply with BAP within the project budget (e.g., a company such as Lowes that has the resources to make BAP compliance economically feasible).

Which bidder must the Tribal Recipient choose?

# Hypothetical # 10 – Answer

The BAP would require the Tribal Recipient to choose the non-Indian owned business. The Tribal Recipient would be unable to meet both the Indian preference requirements and the BAP requirements.

**However**, HUD ONAP Guidance recommends that the Tribal Recipient apply for a waiver for Unique Tribal Conditions (a type of non-availability waiver).



## Hypothetical #11

A Tribal Recipient used non-federal funding to procure and order Construction Materials for an Infrastructure Project. The Tribal Recipient then receives an FY 2025 IHBG grant of over \$2.6 million to fund the project. The Tribal Recipient ordered the Construction Materials before receiving the IHBG grant, but those Construction Materials were not paid for or delivered until after the Tribal Recipient uses the IHBG grant for the project.

Do those Construction Materials need to comply with the BAP?

# Hypothetical # 11 – Answer

- Most likely not. HUD will review on a case-by-case basis whether it will require a Tribal Recipient to retroactively apply BABA to materials already ordered. If a Tribal Recipient anticipates receiving and using Federal funding for a project, we recommend including BAP requirements in the project contracts ahead of time. Tribal Recipients should contact their ONAP Point of Contact for further guidance.

# Construction Phase

- The Tribal Recipient should ensure and document that all products installed during the construction phase of an Infrastructure Project comply with BAP.
- A Tribal Recipient 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 BAP 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 BAP-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 BAP non-compliant Iron and Steel Products, Manufactured Products, and Construction Materials, and ensure that any subcontractor/vendor does not invoice the Tribal Recipient for BABA non-compliant items.
- Report any non-BAP compliant materials or subcontractors to the Tribal Recipient.

# Construction Phase (Cont'd)

- If a non-BAP-compliant material has already been installed, the contractor should immediately notify the Tribal Recipient.
  - The Tribal Recipient 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 Tribal Recipient should obtain, create, and maintain thorough documentation to demonstrate BAP compliance on projects subject to BAP.
- This includes maintaining documentation of each quote that the Tribal Recipient 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 longer if specified in the Federal funding award.
  - (See e.g., 24 CFR 1000.552 for IHBG and 24 CFR 1003.501(a)(10) for ICDBG)

# 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 Tribal Recipient, but may include:
    - Document actual costs (e.g., invoices) for products and materials
    - Quotes received for domestically produced products
    - Total project costs



# Procedures for Addressing Noncompliance

- Based on HUD guidance, a Tribal Recipient 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, Tribal Recipients 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 BAP-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