



## **Build America, Buy America Act U.S. Department of Education Domestic Sourcing Requirements and Grant Waiver Request Procedure**

September 26, 2022

The [Build America, Buy America Act](#) (BABAA),<sup>1</sup> signed as part of the bipartisan Infrastructure Investment and Jobs Act (IIJA) in November 2021, requires that certain identified U.S. Department of Education (the Department) grant programs ensure that the iron, steel, manufactured products, and construction materials used in their grants are made in America.

This document describes the applicability, requirements, and process of grantees obtaining a waiver from the BABAA domestic sourcing requirements.

### **Initial Questions – Do you need to request a waiver?**

1. *Infrastructure Program?*

Is your grant program one of the identified grant programs on the Department’s [List of Infrastructure Programs Subject to BABAA](#)? If not, the BABAA domestic sourcing requirements do not apply to your grant and no further action is required.

2. *Infrastructure Project?*

Is the project *within* your BABAA-identified grant program an “infrastructure project”? That is, does the specific project involve construction, remodeling<sup>2</sup> or building broadband infrastructure? The BABAA domestic sourcing requirements only apply to infrastructure projects supported by the grant.

3. *Does an agency-level BABAA waiver apply?*

The Department has proposed agency-level waivers that allow BABAA-identified grant programs with infrastructure projects to waive all or part of the BABAA domestic sourcing requirements. Once confirmed by OMB to be consistent with policy and after consideration of public comment, infrastructure projects may waive all or part of the BABAA domestic sourcing requirements when:

- a. Your overall total grant award is for less than \$250,000 (the current simplified acquisition threshold) ([Small Grants Waiver](#));

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<sup>1</sup> An overview of the BABAA domestic sourcing requirements is available here: [https://www.whitehouse.gov/omb/briefing-room/2022/04/20/how-build-america-buy-america-guidance-strengthens-made-in-america-requirements/?utm\\_source=link](https://www.whitehouse.gov/omb/briefing-room/2022/04/20/how-build-america-buy-america-guidance-strengthens-made-in-america-requirements/?utm_source=link).

<sup>2</sup> Projects considered under the Department’s Regulations as “minor remodeling” (34 CFR § 77.1) are not considered infrastructure projects and are not subject to the BABAA Domestic Sourcing Requirements.

- b. Your infrastructure project is only 5% or less of your total grant award, up to \$1,000,000<sup>3</sup> ([De Minimis Waiver](#));
- c. Your infrastructure project has minor non-domestic components up to 5% of the total material cost of an infrastructure project of an otherwise domestically produced iron and steel product, manufactured product, and construction material to be used ([Small Components Waiver](#)); or
- d. Your infrastructure project is underway pursuant to existing multi-year construction, remodeling, or broadband infrastructure contracts in place prior to the end of the Department's agency adjustment period on October 1, 2022. Future contract modifications must be submitted to the Department for review and approval. This waiver does not cover any contract modifications that extend or include additional or new construction, remodeling, or broadband infrastructure development. The waiver would also not cover any new contracts that are issued after October 1, 2022. ([Adjustment Period Waiver for Previously Approved Projects](#))

Approved agency-level waivers are posted at: [Agency-level Waivers](#).

→ If these conditions or waiver flexibilities apply to your grant, you may not be subject to the BABAA domestic sourcing requirements.<sup>4</sup>

→ However, if your grant is subject to the BABAA domestic sourcing requirements, you may request an individual grantee waiver by completing and submitting the [BABAA Waiver Request Form](#).

### **Grantee BABAA Waiver Request Process**

1. For a proposed construction, renovation, or broadband infrastructure project, a grantee may submit a [BABAA Waiver Request Form](#) and supporting documentation to the Department before, during, or after it solicits bids for the project that are subject to the BABAA domestic sourcing requirement when one or more of the following conditions is met:
  - a. Applying the BABAA domestic sourcing requirement would be inconsistent with the public interest.
  - b. The types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality.
  - c. The inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25 percent.

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<sup>3</sup> For example, if the total cost of a recipient's infrastructure project is \$2,000,000, up to \$100,000 of costs for iron and steel, manufactured goods and construction materials would be exempt from BABAA.

<sup>4</sup> Please note that any grantee determining that an agency-level waiver is applicable to their infrastructure project(s) must carefully document the reasoning for their determination and have that documentation available to review by Department officials, auditors, and/or the Department's Office of the Inspector General.

2. The BABAA Waiver Request Form must include the following:
- a. Entity name.
  - b. Entity UEI.
  - c. Grant program name.
  - d. Grant program Assistance Listing Number (ALN).
  - e. Grant PR/Award Number (if applicable).
  - f. Total grant award amount.
  - g. Waiver request contact person name.
  - h. Waiver request contact person title.
  - i. Waiver request contact person email.
  - j. Waiver request contact person phone.
  - k. Total cost of infrastructure project(s).
  - l. Amount of costs supported by the grant.
  - m. Infrastructure project description and location.
  - n. Whether a project covered under the waiver will be funded by any other Federal financial assistance.
  - o. The type of waiver being sought (see item 4 for types of waivers).
  - p. Whether the waiver is for a specific product or a category of products.
    - If for a category of products, a description of products, including the type or category of item (i.e., Iron or Steel; Manufactured Product; Construction Material; and country of origin, if known).
    - If for a specific product, identification that it is Iron or Steel; Manufactured Product; or Construction Material; and country of origin, if known.
  - q. Product and Service Codes (PSC) or North American Industry Classification System (NAICS) code:
    - PSC codes describe products, services, and research and development purchased by the Federal government. PSC codes can be found in the Product Service Code sections of the [Product and Service Code Manual](#) on [Product and Service Code Manual | Acquisition.GOV](#).
    - The NAICS codes are used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. NAICS codes classify businesses based on the particular product or service supplied. A business will generally have a primary NAICS code, but it can also have multiple NAICS codes if it sells multiple products and services. NAICS codes can be found by conducting a keyword search in the NAICS search fields at [U.S. Census Bureau](#) or by accessing the NAICS code lists under the Reference File tab on [U.S. Census Bureau](#).
  - r. Waiver Timeline.
    - Explanation that the waiver will be in place for either the entire period of

performance of the grant or for a limited time during the period of performance.

- s. Waiver justification narrative including any anticipated impact if the waiver request is disapproved.
    - For a Public Interest Waiver, a description of the specific circumstances that may be in the public interest to grant a waiver from the BABAA domestic sourcing requirements.
    - For a Non-availability Waiver, a description of why identified domestic iron, steel, manufactured products, or construction products are unavailable, and the steps taken to determine their unavailability.
    - For an Unreasonable Cost Waiver, a description reflecting how the determination was made that the cost of domestic iron, steel, manufactured and construction products will increase the cost of the overall project(s) by more than 25 percent, and the market research and/or industry outreach performed to make this determination.
  - v. Waiver supporting documentation, which could include such information as price quotes, market research, industry outreach, or public interest supporting documentation.
3. To submit a waiver request, the grantee must email the [BABAA Waiver Request Form](#) and supporting documentation to the Education Program Contact identified in box 3 of the grantees' Grant Award Notification (GAN). **A subrecipient's (subgrantee) or contractor's waiver request** is submitted to the Education Program Contact by and through the grantee. This is because all waivers must be submitted to the Department through the grantee, regardless if the entity seeking the waiver is a subrecipient (subgrantee) or their contractor. Pass-through entities, such as a State Educational Agency, **may not approve** waivers of the BABAA domestic sourcing requirements.
  4. The Education Program Contact will review the waiver request for completeness. Waiver requests may be returned for additional information if information is deemed to be missing. Waiver requests are then published on the Department's [Build America Buy America Waivers](#) website for 15 days. During this period, the Department welcomes the submission of informal public comment through its website. Additionally, the waiver request is submitted to the Office of Management and Budget's (OMB's) Made In America Office (MIAO) for its review. MIAO will review the waiver request for consistency with policy and will post the waiver request and MIAO's determination on its [Buy America Waivers for Federal Financial Assistance](#) public facing website for transparency purposes. Simultaneously, the General Services Administration (GSA) will also post the waiver request on its [Made In America](#) website for transparency purposes. Neither MIAO nor GSA will solicit public comment.
  5. Once the informal public comment period closes, and MIAO completes its review, the Department will decide whether to grant the waiver.

6. Once the Department issues a decision, the Education Program Contact will notify the grantee of the Department's decision. The Department's decision will be posted on the Department's [Build America Buy America Waivers](#) website. Final waivers will also be posted on the MIAO and GSA websites.

## Questions

Please refer questions regarding this document to the Education Program Contact identified in box 3 of the grantee's GAN.

## Links and Resources

- [Build America Buy America Waivers Website \(ed.gov\)](#)
- [List of Infrastructure Programs Subject to BABAA](#)
- [Frequently Asked Questions about the Build America, Buy America Act](#)
- [BABAA Waiver Request Form](#)
- [Made In America Office Resources](#)