



**Build America, Buy America Act
Domestic Content Procurement Preference Requirements
Agency Level Waivers and Grantee Waiver Request Procedures**

U.S. Department of Education

Updated 02/21/24

The [Build America, Buy America Act](#) (BABAA), 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.

Pursuant to Section 70914(b) of BABAA and 2 CFR 184.7, the Department may approve, subject to notice and comment requirements and the Office of Management and Budget Made in America Office (MIAO) review, Public Interest, Nonavailability, or Unreasonable Cost waivers to the BABAA domestic content procurement preference when it finds that:

- a. Applying the BABAA domestic content procurement preference would be inconsistent with the public interest (**Waiver type – 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 (**Waiver Type - Nonavailability Waiver**); or
- 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 (Waiver type - **Unreasonable Cost Waiver**).

This document describes the applicability, requirements, and process for grantees obtaining a waiver from the BABAA domestic content procurement preference 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 affected grant program an “infrastructure project”? That is, does the specific project involve construction or building broadband

infrastructure? The BABAA domestic sourcing requirements only apply to infrastructure projects and activities supported by the grant. Non infrastructure project or activities are not subject to the BABAA domestic content procurement preference requirements.

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

The Department has established the following four public interest, time-limited, targeted, and conditional agency level BABAA waivers that permit grantees and their subrecipients under affected programs to waive the BABAA domestic content procurement preference requirements without seeking prior approval from the Department:

- a. [Tribal Consultation Waiver for Financial Assistance Agreements with Indian Tribes](#) – This waiver requires consultation with Indian Tribes for the purpose of identifying narrower project or product specific Indian Tribal waivers. It also requires that the Department provide BABAA related technical assistance and training to Indian Tribes throughout the waiver’s duration. It is effective February 7, 2024, for one year.
- b. [Pacific Island Territories Waiver](#) – This waiver is applicable to the Commonwealth of the Northern Mariana Islands, Guam, and American Samoa. It requires that the Department provide BABAA related technical assistance and training to affected grantees of these Pacific Island Territories throughout the waiver’s duration. It is effective January 2, 2024, for one year.
- c. [Previously Planned Infrastructure Projects Waiver](#) – This waiver is applicable to grantee infrastructure contracts entered into prior to October 1, 2022, and/or contracts entered into before March 1, 2023, that resulted from solicitations published before May 14, 2022. It is effective November 3, 2023, for two years.
- d. [De Minimis, Small Grants, Minor Components Waiver](#) – Grantees may exercise any of this waiver’s three components as applicable: 1) Small Grants – Applicable to grants funded for \$250,000 or less; 2) De Minimis – 5% of the infrastructure project’s total costs up to a maximum of \$1,000,000 may be exempted; and 3) Minor Components -- Domestically manufactured iron and steel products that include non-domestically produced minor components may be used in the infrastructure project as long as the non-domestically produced minor components do not exceed 5% of the domestically manufactured products’ total costs. This waiver is effective July 31, 2023, for five years.

Agency Level Waivers

1. Grantees wishing to implement any of the Department’s four agency level waivers must notify their Education Program Contacts listed in box 3 of their Grant Award Notifications (GAN) that they will implement the waiver. The notification must include the following:
 - a. Entity name.
 - b. Entity UEI.
 - c. Grant program name.

- d. Grant PR/Award Number.
 - e. Contact person name.
 - f. Contact person title.
 - g. Contact person email.
 - h. Contact person phone.
 - i. The agency level waiver to be implemented.
 - j. Total cost of the infrastructure project(s).
 - k. Amount of costs supported by the grant.
 - l. Infrastructure project description and location.
 - m. 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. However, when adopting an agency level waiver, grantees may not implement agency level waivers for longer than the duration stated in the waiver.
 - n. For the De Minimis, Small Grants, or Minor Components agency-level waiver, the waiver component to be implemented must be identified (more than one may be identified):
 - i. De Minimis, including the maximum De Minimis amount permitted under the grant project in accordance with the calculation required under the De Minimis, Small Grants or Minor Components agency-level waiver.
 - ii. Small Grants.
 - iii. Minor Components, including an itemization of the minor components used in the infrastructure project, as well as a summary explaining how the grantee determined that the minor component comprises no more than 5% of the total material cost.
2. While these notifications do not require approval from the Department, Department staff will review the notifications for completeness and accuracy and may contact the grantee for clarification and revisions.

Grantee BABAA Waiver Request Process

- 1. For a proposed construction¹ or broadband infrastructure project or activity, a grantee that does not qualify for an agency level waiver but believes it can justify the need for a grant specific infrastructure project or activity waiver must submit a waiver request using the [BABAA Waiver Request Form](#) to the Department before, during, or after it solicits bids for the project or activity that is subject to the BABAA domestic content procurement preference requirements.

Information required to be submitted for a waiver request must be entered into the BABAA Waiver Request Form. The required information and the form’s corresponding data fields are:

- a. Entity name.
- b. Entity UEI.
- c. Grant program name.

¹ Grant projects or activities considered under the Department’s general administrative regulations to be “minor remodeling” ([34 CFR § 77.1\(c\)](#)) are not considered infrastructure projects and are not subject to the BABAA domestic content procurement preference requirements.

- 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 (i.e., Nonavailability, Unreasonable cost, or Public Interest waiver).
- p. List of iron or steel item(s), manufactured products, and construction material(s) proposed to be excepted from the BABAA domestic content procurement preference requirements, including name, cost, and country(ies) of origin, if known.
- q. Product and Service Codes (PSC) and the North American Industry Classification System (NAICS) code:
 - i. 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](#).
 - ii. 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:
 - i. 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. Wavier justification narrative, including any anticipated impact if the waiver request is disapproved:
 - i. Based on the type of waiver requested, the following must be included in the justification:

- For a **Public Interest Waiver**, the specific circumstances that are in the public interest that justify a waiver from the BABAA domestic content procurement preference requirements.
 - For a **Nonavailability Waiver**, the domestic iron, steel, manufactured products, or construction materials that are unavailable, and the steps taken to determine their unavailability.
 - For an **Unreasonable Cost Waiver**, how the determination was made that the cost of domestic iron, steel, manufactured products, and construction materials will increase the cost of the overall project(s) by more than 25 percent.
- ii. A description of any market research and industry outreach conducted, if applicable, must be included. Market research, where applicable, should include relevant details, including who conducted the market research, when it was conducted, sources that were used, and the methods used to conduct the research. If applicable, the absence of any Buy America-compliant bids received in response to a solicitation may be included.
- t. Waiver supporting documentation, which could include such information as price quotes, market research, industry outreach, or public interest supporting documentation.
2. Grantees submit their BABAA Waiver Request Form and supporting documentation by emailing the signed form and supporting documentation to the Education Program Contact identified in box 3 of the grantees' 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 of 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.
 3. The Department will review the waiver request for completeness. Waiver requests may be returned for additional information if information is deemed to be missing.
 4. Waiver requests are then published for public comment on the Department's [Build America Buy America Waivers](#) website for 15 calendar days. During this period, the Department welcomes the submission of informal public comment. Additionally, the Department will publish the waiver on the General Services Administration's waiver website: [Waivers | Made in America](#).
 5. Once the public comment period closes, the Department will adjudicate public comments received, and will submit the waiver request and supporting documentation to MIAO for its review. MIAO will review the waiver request for consistency with BABAA domestic content procurement preference policy.

6. After MIAO issues its determination, the Department will approve or disapprove the waiver request. The Department decisions to approve or disapprove are final. A grantee has no right of appeal.
7. 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.

Record Retention Requirements

1. Grantees must maintain, in accordance with [2 CFR 200.334](#), all agency level waiver and grantee waiver request documentation and must have that documentation available for review, as deemed necessary, by Department officials, auditors, and/or the Department's Office of the Inspector General.

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 Act](#)

[Build America Buy America Waivers Website \(ed.gov\)](#)

[List of the Department of Education Infrastructure Programs](#)

[Frequently Asked Questions about the Build America Buy America Act](#)

[Made In America Office Resources](#)

[Waivers | Made in America](#)

[Build America, Buy America Act – Federal Financial Assistance | OMB | The White House](#)

[M-22-11](#) *Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure*

[M-24-02](#) *Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure*

[2 CFR Part 184 -- Buy America Preferences for Infrastructure Projects](#) for BABAA

[2 CFR § 200.334 Retention Requirements for Records](#)