

BABAA Best Practices

Documenting Compliance with Build America, Buy America Act (BABAA) Requirements

Procurement Disaster Assistance Team
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FEMA

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Background

Overview of FEMA BABAA Requirements

The Infrastructure Investment and Jobs Act (IIJA), signed into law in November 2021, includes the Build America, Buy America Act (BABAA), which applies a new purchasing preference for American-made products. In accordance with BABAA, FEMA must ensure that no federal financial assistance for “infrastructure” projects are awarded “unless all the iron, steel, manufactured products and construction materials used in the project are produced in the United States,” by May 14, 2022.¹

In November 2022, FEMA issued, [FEMA Interim Policy #207-22-0001: Buy America Preference in FEMA Financial Assistance Programs for Infrastructure](#) (“interim guidance”), to implement the BABAA requirements for the [23 FEMA financial assistance programs subject to BABAA](#). The interim guidance includes requirements related to both material purchases and contract language. To comply with these requirements, FEMA award recipients and subrecipients must include a required contract provision and contractor self-certification of compliance with BABAA in subject contract documents. FEMA also recommends recipients and subrecipients further document compliance with BABAA by requesting a BABAA certification letter from the manufacturer. The interim guidance also provides information on waivers, including FEMA’s waiver authority and waiver request process.

The purpose of this document is to provide some best practices for FEMA award recipients and subrecipients on how to document compliance with key BABAA requirements.

Not all FEMA financial assistance programs are subject to BABAA. Most disaster financial assistance programs are not subject to the requirements, including the Public Assistance Grant Program, Hazard Mitigation Grant Program, Individuals and Households Program, and Fire Mitigation Grant Program. A full list of programs and whether they are subject to BABAA can be found at [Programs and Definitions: Build America, Buy America Act | FEMA.gov](#).

¹ Although BABAA requirements went into effect on May 14, 2022, FEMA determined that it was in the public interest to issue a general applicability waiver of the BABAA requirements to allow for an adjustment period in order for FEMA, its recipients/subrecipients, industry partners, and other stakeholders to develop and transition to the new compliance and certification process for iron, steel, manufactured products, and construction materials. **This waiver was effective from July 1, 2022 through January 1, 2023.** The domestic preference requirements will not apply to awards or funding obligated during this waiver period and will only apply to awards or funding obligated on or after Jan. 2, 2023.

BABAA Domestic Preference Requirements

BABAA requires that FEMA award recipients and subrecipients subject to BABAA comply with the following domestic preference requirements in their infrastructure projects:

1. All iron and steel items used in the project must be produced in the United States. This means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.
2. All manufactured products used in projects must be produced in the United States. For a manufactured product to be considered produced in the United States, the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States must be greater than 55% of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation.
3. All construction materials used in projects must be manufactured in the United States. This means all manufacturing processes for the construction material occurred in the United States.

BABAA Contract Level Compliance

Pursuant to [*FEMA Interim Policy #207-22-0001: Buy America Preference in FEMA Financial Assistance Programs for Infrastructure*](#), all recipient and subrecipient contracts under FEMA financial assistance awards for infrastructure, issued on or after Jan. 2, 2023, must include a contract provision explaining the BABAA requirements and a self-certification where contractors can certify compliance with domestic preference requirements outlined in BABAA, unless FEMA waives the BABAA requirement.

SUGGESTED LANGUAGE

The following provides suggested language for the contract provision:

Contractors and their subcontractors who apply or bid for an award for an infrastructure project subject to the domestic preference requirement in the Build America, Buy America Act (BABAA) shall file the required certification to the non-federal entity with each bid or offer for an infrastructure project, unless a domestic preference requirement is waived by FEMA. Contractors and subcontractors certify that no federal financial assistance funding for infrastructure projects will be provided unless all the iron, steel, manufactured projects, and construction materials used in the project are produced in the United States. BABAA, Pub. L. No. 117-58, §§ 70901-52. Contractors and subcontractors shall also disclose any use of federal financial assistance for infrastructure projects that do not ensure compliance with BABAA domestic preference requirement. Such disclosures shall be forwarded to the grant recipient who in turn will forward the disclosures to FEMA, the federal awarding agency;

subrecipients will forward disclosures to the pass-through entity, who will in turn forward the disclosures to FEMA.

For FEMA financial assistance programs subject to BABAA, contractors and subcontractors must sign and submit the following certification to the next tier (e.g., subcontractors submit to the contractor; contractors submit to the non-federal entity).

SUGGESTED LANGUAGE

The following provides suggested language for the self-certification:

The undersigned certifies, to the best of their knowledge and belief, that:

The Build America, Buy America Act (BABAA) requires that no federal financial assistance for “infrastructure” projects is provided “unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.” Section 70914 of Public Law No. 117-58, §§ 70901-52.

The undersigned certifies that for the _____ (**Project Name and Location**) _____ the iron, steel, manufactured products, and construction materials used in this contract are in full compliance with the BABAA requirements including:

1. All iron and steel used in the project are produced in the United States. This means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.
2. All manufactured products purchased with FEMA financial assistance must be produced in the United States. For a manufactured product to be considered produced in the United States, the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55% of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation.
3. All construction materials are manufactured in the United States. This means that all manufacturing processes for the construction material occurred in the United States.

“The, _____ [**Contractor or Subcontractor**] _____, certifies or affirms the truthfulness and accuracy of each statement of its certification and disclosure, if any. In addition, the [**Contractor or Subcontractor**] understands and agrees that the provisions of 31 U.S.C. Chap. 38, Administrative Remedies for False Claims and Statements, apply to this certification and disclosure, if any.”

Signature of [**Contractor’s or Subcontractor’s**] Authorized Official

Name and Title of [**Contractor’s or Subcontractor’s**] Authorized Official

Date

Manufacturer Certifications

As an additional step to ensure compliance when purchasing products for the project, FEMA award recipients or subrecipients may request a certification letter from the product manufacturer to demonstrate compliance with BABAA requirements. Although requesting manufacturer certifications is not required, FEMA recommends this step as a best practice for documenting compliance with BABAA. FEMA recommends that certification letters contain five essential elements, which include:

- A reference to the project;
- Specific product information;
- Compliance with BABAA reference;
- Location of manufacturer (country); and
- A company representative signature.

The certification letter should be maintained as part of the project record to be made available to FEMA if requested. Below are examples of the types of manufacturer certifications.

Step Certification

A step certification is a type of certification process under which each handler (supplier, fabricator, manufacturer, processor, etc.) of the subject products and materials certifies that their step in the process was domestically performed. Each time a step in the manufacturing process takes place, the manufacturer delivers its work along with a certification of its origin. Step certification creates a paper trail which documents the location of the manufacturing process involved with the production of subject products and materials. Sample step certification language is included below.

SAMPLE STEP CERTIFICATION LETTER:

Company letterhead.

Date

Company Name

Company Address

City, State Zip

Subject: Build America, Buy America Act Step Certification for Project (XXXXXXXXXX)

I, (**company representative**), certify the (**melting, bending, coating, galvanizing, cutting, etc.**) process for (**manufacturing or fabricating**) the following products and/or materials shipped or provided for the subject project is in full compliance with the Build America, Buy America Act

(BABAA) requirement as mandated in the Infrastructure Investment and Jobs Act (IIJA) Pub. L. No. 117-58, §§ 70901-52.

Item, Products and/or Materials:

1. XXXX
2. XXXX
3. XXXX

Such process took place at the following location: _____.

If any of the above compliance statements change while providing material to this project, we will immediately notify the prime contractor and the engineer.

Signed by company representative

Final Certification Letter

Although obtaining step certification is a best practice, if not possible, FEMA award recipients and subrecipients may consider requesting a final manufacturer certification letter. For a final certification letter, the final manufacturer that delivers the product to the worksite, vendor, or contractor provides a certification asserting that all manufacturing processes occurred in the United States. While this type of certification may be acceptable, it may not provide the same degree of assurance, and therefore additional documentation may be needed if the certification is lacking important information. Sample final certification language is included below.

SAMPLE FINAL CERTIFICATION LETTER

Company letterhead.

Date

Company Name

Company Address

City, State Zip

Subject: Build America, Buy America Act Certification for Project (XXXXXXXXXX)

I, (**company representative**), certify that the following products and/or materials shipped/provided to the subject project are in full compliance with the Build America, Buy America Act (BABAA) requirement as mandated in the Infrastructure Investment and Jobs Act (IIJA) Pub. L. No. 117-58, §§ 70901-52.

Item, Products and/or Materials:

1. XXXX
2. XXXX
3. XXXX

Such process took place at the following location: _____.

If any of the above compliance statements change while providing material to this project, we will immediately notify the prime contractor and the engineer.

Signed by company representative

FEMA BABAA Waivers

Waivers

FEMA has the authority to waive the BABAA requirement when: (1) applying the requirement is inconsistent with the public interest (a “public interest waiver”); (2) 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 (a “nonavailability waiver”); or (3) 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% (an “unreasonable cost waiver”).

If a project cannot comply with the BABAA requirements, recipients and subrecipients must seek a waiver from FEMA. There are two categories of waivers: General Applicability Waivers and Project-Specific Waivers.

General Applicability Waivers

The term “general applicability waiver” refers to a waiver that applies generally across multiple awards. A general applicability waiver can be “product-specific” (e.g., applies only to a product or category of products) or “non-product specific” (e.g., applies to all “manufactured products”). Award recipients subject to BABAA may use general applicability waivers and do not require a separate application or approval by FEMA prior to use. These may cover categories of products known to be unavailable domestically or are intended to ease the burden of compliance.

For example, FEMA has issued one general applicability waiver to date, the [FEMA General Applicability Public Interest Waiver](#). Although the BABAA requirements went into effect on May 14, 2022, FEMA determined that it was in the public interest to issue a general applicability waiver of the BABAA requirements to allow for an adjustment period for FEMA, its recipients/subrecipients, industry partners, and other stakeholders to develop and transition to the new compliance and certification process for iron, steel, manufactured products, and construction materials. This waiver is effective from July 1, 2022, until Jan. 1, 2023. The domestic preference requirements will not attach to awards or funding obligated during this waiver period and will only attach to awards or funding obligated on or after Jan. 2, 2023.

FEMA anticipates issuing additional general applicability waivers related to *de minimis*, minor components, adjustment period for tribes, and small projects. As FEMA proposes and issues these waivers, they will be available for review on the [FEMA BABAA website](#).

Project-Specific Waivers

Project-specific waivers are for the use of a specified non-domestic product for a single project. An assistance recipient may request a waiver from FEMA through their FEMA grant representative. FEMA must approve waiver requests before a FEMA funded project can permanently incorporate a non-domestic product. Due to waiver requests being both project- and product-specific, any other assistance recipient who wishes to use a waiver for a similar product must apply for a separate waiver based on specific project circumstances.

Waiver Submission

The steps below outline the process for submitting a project-specific waiver request application. For the additional information on the Interim Waiver Review Process, please see [FEMA Interim Policy #207-22-0001: Buy America Preference in FEMA Financial Assistance Programs for Infrastructure](#). FEMA estimates that the timeline for most waiver requests will be 45-calendar days from date of submission until final waiver determination is made.

Step 1	Develop written waiver request. Request must include detailed justification for product use, product specifications, and a description of the effort to find an equivalent domestic product. Refer to “Waiver Requests” for additional guidance and requirements.
Step 2	Submit waiver request to FEMA grant representative.
Step 3	FEMA will perform a technical review of the waiver request. The waiver applicant should be prepared to provide additional information during FEMA’s technical review and respond to any such requests as soon as possible (and no later than 15 calendar days) after FEMA requests the information.

After FEMA completes the technical waiver review, the agency posts the waiver application for either a 15-calendar day or 30-calendar day (for general applicability waivers) public comment period after which a final determination will be made by the Office of Management and Budget (OMB) Made in America Office (MIAO). FEMA will inform the applicant of the final determination and the FEMA website will be updated with the determination status.

Waiver Requests

FEMA will use the following checklist to ensure applicant submissions for a waiver request meet BABAA requirements. We recommend recipients and subrecipients utilize this checklist to ensure timely review of their waiver request.

The checklists below outline the elements that should be included in the waiver requests, including:

1. Applicant or recipient information;
2. Infrastructure project information;
3. Project Materials, Technical Specifications, and Quantity;

4. Waiver Type; and
5. Federal Agency Information (this is to be completed by the federal agency)

Applicant or Recipient Contact Information

Ensure the following information is included within the application. All information provided should be at the recipient or subrecipient level where the product is to be installed:

- Legal Name
- Unique Entity Identifier (UEI)
- Street Address
- City
- County/Parish
- State
- Zip/Postal Code
- Submitter First and Last Name, Title, Email and Phone Number

Infrastructure Project Information

Ensure the following is completed within the application:

- Infrastructure project description and location
- Total Funding, including federal and non-federal costs
- Total estimated infrastructure costs, including all federal and non-federal shares (to the extent known)
- Identification if the waiver is for a specific product or a category of products

Project Materials, Technical Specifications, and Quantity

Ensure the following is completed within the application:

- List of iron or steel item(s), manufactured products, and constructions material(s) proposed to be excepted from BABAA requirements, including:
 - Name
 - Cost

- Country(ies) of origin (if known)
- Relevant Product Service Code (PSC) and North American Industry Classification System (NAICS) code for each
- Technical specifications description of item(s) to be waived. Waiver request cannot proceed without specifications. Examples of descriptions include:
 - PDF of plans and specifications (with individual product page highlighted)
 - Email defining products
 - Product cut sheet from manufacturer
 - Other
- Product quantity required
- Date required for product delivery

Waiver Type

Ensure the project-specific waiver type and information inputs for the waiver type is completed within the application:

- Nonavailability**
 - A description of the due diligence performed by the applicant, engineer/architect, or contractor, including names, and contact information of the manufacturers, distributors, or suppliers contacted for quotes (minimum 3) and the responses provided.
 - If one or more respondent indicated that they could provide a BABAA compliant item, but you are requesting the non-availability waiver because the lead time to obtain the BABAA compliant item is excessive, indicate how the difference in lead time between a BABAA compliant and non-compliant item is going to cause the project to miss a significant milestone or deadline.
- Unreasonable Cost** (BABAA compliance increases total project cost by more than 25%)
 - What is the additional cost of the BABAA compliant items, compared to using iron and steel, manufactured products, and construction materials of non-domestic or unknown origin? (File attachment of prices for BABAA compliant and non-compliant items for items to be included in the cost comparison.)
 - What is the additional administrative cost for compliance with the BABAA requirements? (File attachment of certification from the engineer or architect attesting to the actual or expected additional administrative cost.)

- For which items does the applicant request to be waived from the BABAA requirements to reduce costs below the 25% cost threshold?
- Public Interest**
 - Explanation of how waiving the BABAA requirement for this project or product serves the public interest
 - Additional information for the Agency to consider for the requested waiver
 - Anticipated impact if no waiver is issued
 - Certifying Official Name
 - Certifying Official Signature
 - Date of Certification

Federal Agency Information

Ensure the following is completed by the federal agency within the application:

- Federal Awarding Agency
- Financial assistance listing name and assistance listing number
- Federal financial assistance program title
- Federal awarding agency point of contact:
 - First Name
 - Last Name
 - Email
 - Phone
- Federal Award Identification Number (FAIN) (if available). Federal awarding agency organization information (e.g., Common Government wide Accounting Classification [CGAC] Agency Code). Enter the federal agency name, and subcomponent name, if known, and CGAC code.
- Indication of waiver level (Project, Award, Program, or Agency)
- Indication if waiver is a general applicability waiver or project-specific

- Agency summary and determination regarding the waiver request
- Attachment of additional files if space is needed to answer any of the questions in the form.
- Agency waiver, in an attempt to avoid the need for a project-specific waiver. Such a justification may cite, if applicable, the absence of any BABAA compliant bids received in response to a solicitation. This response should be a narrative and include all necessary information to support the justification for a waiver.

Additional Information

Additional information, including definitions, can be found at ["Buy America" Preference in FEMA Financial Assistance Programs for Infrastructure | FEMA.gov](#) and [Build America, Buy America Act Frequently Asked Questions \(FAQs\) | FEMA.gov](#). You can also refer to the Office of Management and Budget's Made in America Office Website ([Home | Made in America](#)) and the [Build America, Buy America Factsheet and FAQs for Award Recipients \(whitehouse.gov\)](#).