

## **BABA Checklist & Best Practices**

### **BABA Activities Checklist**

<i>ACTIVITY</i>	<b>Consultant</b>	<b>Engineer/ Architect</b>	<b>Contractor</b>
<b>A. Pre-Award</b>			
While preparing the bid packet, identify bid items that will, or are likely to include BABA Applicable Materials.			
Include BABA Requirements when advertising for bids to ensure responsible bid responses.			
<b>B. Post-Award</b>			
Finalize list of all materials based on the bid awarded.			
Fill out Form A400 with the initial list of <i>all</i> materials to be used in the project & upload to the Group B Performance Report in TDA-GO.			
As materials are ordered, request a Manufacturer's Certification for all BABA-applicable materials that are included in the current and all previous BABA Implementation Phases.			
Review and update the A400 as necessary with each submitted Change Order or Construction MSR.			
<b>C. Payment Requests</b>			
Submit an updated Form A400 & all <i>new</i> Manufacturer's Certifications with <i>each</i> payment request for Construction funds.			
<b>D. Satisfy BABA Special Condition</b>			
Upload the <i>final</i> Form A400 to the Special Condition on the Grant Overview page in TDA-GO.			

### **BABA Best Practices**

#### **Documenting Materials on Form A400:**

- The purpose of Form A400 is to document **ALL** materials being used in a project to ensure BABA compliance. Even materials that are not BABA Applicable should be listed so TDA can ensure all compliance requirements are met and provide appropriate Technical Assistance to help prevent potential Findings.
- Form A400 requests the Related Bid Item # for each Material Description. However, this form should list all materials, not necessarily all bid items.
  - Some materials (such as fasteners) may be used across multiple bid items. For ease of reporting, these materials may be listed once with each associated Bid Item # noted rather than listing them out separately for each Related Bid Item #.
  - Some bid items (such as Curb & Gutter) may use multiple different materials (Cement Aggregate & Rebar). Each material should be listed separately (to the extent feasible).

- When submitting Form A400 with the Group B Performance Report, not all information may be known (such as the Material Unit Cost). TDA will just be looking for the Material Description, Bid Item #, and Quantity. If the material listed is not BABA Applicable or exempt under the current phased implementation, please mark that in the Mfg's Certification column.
- Anytime there is a change to the materials being used (such as on a Change Order adding new bid items or when awarding a second Construction Contract that includes substantially different work), please ensure Form A400 is updated and submitted in TDA-GO in the Additional Documentation attachment field. For quantity-only Change Orders, ensure the A400 submitted on all subsequent Payment Requests is updated to reflect those changes.
- TDA has provided two lists of materials that may be used as guides and safe harbor for identifying materials subject to BABA. The first list is published by the Texas Water Development Board and can be found [HERE](#). The second list is included in the Orange "Phased Implementation Schedule" tab at the bottom of the Form A400.

### Payment Request Procedures:

- Each time a Payment Request is submitted for Construction funds, an updated Form A400 is required to be uploaded to the Request.
- The first time Construction funds are requested for a specific bid item, all Manufacturer's Certifications for materials associated with that bid item must be submitted with the Payment Request (mark the Mfg's Certification column on Form A400 as "Attached"). If a Manufacturer's Certification has already been submitted for a specific material in a previous payment request, it does not need to be re-submitted (mark the Mfg's Certification column on Form A400 as "Submitted").

### Satisfying BABA Special Condition:

- When submitting the final payment request for 100% of construction funds, upload the finalized Form A400 to the Special Condition upload field on the Grant Overview Page in TDA-GO. TDA is not notified when a change is made to the Grant Overview page, as such, please email your TDA Grant Specialist whenever uploading any document to this page. Once notified, your TDA Grant Specialist will mark the Special Condition as complete.

### Mfg's Certification Option Meanings:

<i>OPTION</i>	<b>Meaning</b>
<b>Attached</b>	The Manufacturer's Certification for this material is attached to this Payment Request
<b>Submitted</b>	The Manufacturer's Certification for this material was submitted with a previous Payment Request
<b>No, 5%</b>	This material is BABA Applicable but is part of a <i>De Minimis</i> portion of the project.*
<b>No, Exempted Phase</b>	This material is BABA Applicable but is not required to be reported under the current Implementation Phase. A Manufacturer's Certification is not required to be submitted.
<b>Not BABA Applicable</b>	This material is not BABA Applicable under any phase, and no Manufacturer's Certification is needed.

*\*HUD has waived the application of the Buy America Preference for a De Minimis portion of an infrastructure project, meaning a cumulative total of no more than 5% of the total cost of the iron, steel, manufactured products, and construction materials used in and incorporated into the infrastructure project, up to a maximum of \$1 million. Grant Recipients are not required to submit BABA documentation for materials claimed as part of the De Minimis. Use the % column on Form A400 to determine if a material may be included in the De Minimis. The total % of all materials claimed as part of the De Minimis must be less than or equal to 5%. Only BABA Applicable materials are used to calculate the De Minimis.*

## Categorization of Materials:

- Materials should only be classified into one of the following categories to determine when BABA requirements apply:
  - BABA Applicable Materials:
    - Iron or steel products;
    - Construction materials; or
    - Manufactured products.
  - BABA-Exempt Materials:
    - Section 70917(c) materials.
- Each material should be classified in only one of the categories listed above. In some cases, a material may not fall under any of the categories listed here.
  - HUD has provided clarification regarding *when* materials should be categorized. **The classification of a material must be made based on its status at the time it is brought to the work site.** Section 70917(c) materials that are used at the work site, such as wet concrete or hot asphalt, are not subject to BABA requirements. However, Section 70917(c) materials may be components of manufactured products if, for example, they are used to produce precast concrete products before being transported to the work site. In this case, as a component of a manufactured product, the Section 70917(c) material would be subject to BABA requirements.

## Documentation of BABA Compliance:

- TDA will accept the following as proof of BABA compliance.
  - A copy of the label indicating the material was made in the United States;
  - A copy of the product description or technical specifications that provides sufficient detail to conclude that the materials comply with BABA;
  - A certificate or other documentation from the manufacturer demonstrating that the materials comply with BABA;
  - A signed certification from the contractor of a project certifying compliance with BABA; or
    - **If a contractor is certifying BABA compliance, please utilize Form A402**
  - A signed certification from the manufacturer of the materials certifying compliance with BABA.

## ***BABA Definitions***

### **Materials:**

- Materials: The term “materials” is used by TDA to describe all articles, materials, and supplies that are used within a TxCDBG funded infrastructure project.

### **Iron and Steel Products:**

- The term “iron and steel products” is defined in 2 CFR 184.3 and means materials that consists wholly or predominantly of iron or steel, or a combination of both.
  - **Predominantly iron or steel or a combination of both** means that the cost of the iron and steel content is more than 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the mill products, castings, or forgings utilized in the manufacture of the product.

### **Section 70917(c) Materials:**

- The term “section 70917(c) materials” is defined in 2 CFR 184.3 and means cement and cementitious materials; aggregates such as stone, sand, or gravel, or aggregate binding agents or additives.

## Construction Materials:

- The term “construction materials: is defined in 2 CFR § 184.3 and means materials that consist of only one of the items listed below.
  - **Specifically listed construction materials** must meet BABA requirements for **grants awarded 9/1/2024 or after** and include:
    - Non-ferrous metals;
    - Lumber;
    - Composite building materials; and
    - Plastic and polymer-based pipe and tube.
  - **Not listed construction materials** must meet BABA requirements for **grants awarded 9/1/2025 or after** and include:
    - Plastic and polymer-based products other than composite building materials or plastic and polymer-based pipe or tube;
    - glass (including optic glass); and
    - drywall.
  - **As a note:** minor additions of articles, materials, supplies or binding agents to a construction material do not change the categorization of the construction material.

## Manufactured Products:

- The term “manufactured products” is defined in 2 CFR 184.3 and means:
  - Materials that have been:
    - Processed into a specific form and shape; or
    - Combined with other materials to create a product with different properties than the individual materials.
  - If an item is classified as an iron or steel product, a construction material, or a section 70917(c) material, then it is not a manufactured product. However, a material classified as a manufactured product may include components that are construction materials, iron or steel products, or section 70917(c) materials.

## ***Requesting a Project-/Product-Specific Waiver***

### As a Note:

- As of January 2025, TDA has not seen any waiver applications approved for projects similar to TxCDBG funded projects. Submitting a waiver application does not guarantee approval.
- Any project delays due to the waiver process will not be considered for proposed Grant Agreement extensions.
- **Per HUD and OMB, project-/product-specific waivers will not be approved retroactively for materials that have already been purchased or incorporated into a project.**

### Types of Waivers:

- **Nonavailability Waiver:**
  - May be requested if the types of iron, steel, manufactured products, or construction materials required for the project are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality.
- **Unreasonable Cost Waiver:**
  - May be requested when 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.

- **Public Interest Waiver:**

- May be requested if the use of American made products would be inconsistent with the public interest. Grantees should explain how waiving the BABA requirement for the project or product will serve the public interest and demonstrate definite impacts on the community if specific materials are not utilized in an infrastructure project to support this waiver type.

**Process:**

- Fill out Form A400 to calculate the De Minimis limit and ensure that flexibility is fully applied to the materials used in the project that cannot be procured from domestic manufacturers.
- Determine the type of waiver to be requested.
- Complete the necessary market research to support the need for a waiver. (See next section.)
- Collect the required information to submit the waiver request to TDA. (See next section.)
- Submit to your TDA Grant Specialist a notarized letter addressed to the TxCDBG Director which includes all the required information as specified in the next section.
- TDA will review the information provided, contact the Grant Recipient if additional information is needed, and submit to HUD if deemed appropriate.
- HUD will review the waiver application and contact TDA if additional information is needed to validate the need for a waiver.
- If an application is approved by HUD, the proposed waiver will be posted in the Federal Register for a minimum 15-day public comment period and then submit the request to the Made In America Office (MIAO) at the Office of Management and Budget (OMB).
- The MIAO will review the proposed waiver and public comments for final approval and communicate a final decision to HUD which will communicate it to TDA who will then notify the Grant Recipient.

**Required Information to Submit a Waiver:**

- Per HUD's requirements, the following information is required to submit a waiver application. Please ensure all this information is included in your letter to the TxCDBG Director. If you have not included all the required information, TDA will reject your request.
  - Market research supporting the need for a waiver;
    - Market research may be completed by the contractor who is purchasing the materials to be incorporated into the project.
    - Sufficient market research should include one or more of the following:
      - Document the report showing results of supplier scouting services provided by the [NIST MEP](#), or similar supplier scouting service.
      - Document that the purchaser has made a good faith effort to contact a minimum of three (3) manufacturers or suppliers to determine if a BABA-compliant material is available in sufficient quantity and satisfactory quality. This documentation should include the following:
        - PDF files or screenshots of Internet searches; and
        - Email communications; and
        - Documentation of phone conversations that notes the date and time of the call, the phone number, the contact person with whom the purchaser spoke, and a summary of the information received.
  - Detailed description of the project and location;
  - List of all Federal Agencies funding the project;
    - If any Federal Agencies besides HUD are co-funding the project, please include the Federal Agency's name, Office, Program, and Contact Information.
  - Total sources and amounts of funding, including federal and non-federal shares;
  - Total estimated project costs, including federal and non-federal shares;

- A listing of the material, technical specification, and quantity;
  - HUD requires the name of the iron or steel item, manufactured product, or construction material proposed to be excepted from BABA requirements, including name, cost, countries of origin, relevant [Product Service Code \(PSC\)](#), and [North American Industry Classification System \(NAICS\) code](#).
  - **As a note:** if you have multiple products you would like HUD to review, a waiver application must be submitted for each product.
- Waiver type requested;
  - **Nonavailability Waiver:**
    - If applying for a Nonavailability Waiver, responses to the following are required:
      - A description of the due diligence performed by the applicant, including names and contact information of the manufacturers, distributors, or suppliers contacted for quotes (minimum 3), and the responses provided.
      - In the instance that the lead time to obtain a BABA compliant item is excessive, please attach documentation which indicates:
        - The sum of the project cost and product that was identified;
        - The cost differential between the BABA compliant product and the Non-BABA compliant product that increases the overall project cost to be above the threshold of 25%; and
        - Any quality or quantity issues that were interfaced in the BABA compliant process.
  - **Unreasonable Cost Waiver:**
    - If applying for an Unreasonable Cost Waiver, responses to the following are required:
      - What is the additional cost of the BABA compliant item, compared to using iron and steel, manufactured products, and construction materials of non-domestic or unknown origin?
      - Please demonstrate how the BABA compliant item increases the total project cost by more than 25 percent.
      - Attach documentation of prices for BABA compliant and non-compliant items for the cost comparison.
  - **Public Interest Waiver:**
    - If applying for a Public Interest Waiver, responses to the following are required:
      - Explain how waiving the BABA requirement for this project or product serves the public interest.
- Provide any additional information for HUD’s consideration of the requested waiver;
- Identify any anticipated impacts if no waiver is issued;
- Include the following language at the end of the waiver application letter to certify that the Grant Recipient made a good faith effort to solicit bids for domestic products supported by terms included in requests for proposals, contracts, and nonproprietary communications with the prime contractor;
  - **“I/We, the undersigned, certify under penalty of perjury that the information provided above is true and correct.**  
*WARNING: Anyone who knowingly submits a false claim or makes a false statement is subject to criminal and/or civil penalties, including confinement for up to 5 years, fines, and civil and administrative penalties. (18 U.S.C. §§ 287, 1001, 1010, 1012, 1014; 31 U.S.C. §3729, 3802).”*
- Signed by the Authorized Official; and
- Notarized by a notary public.