

Build America, Buy America Act (BABA): Some Principles and Standards for Compliance

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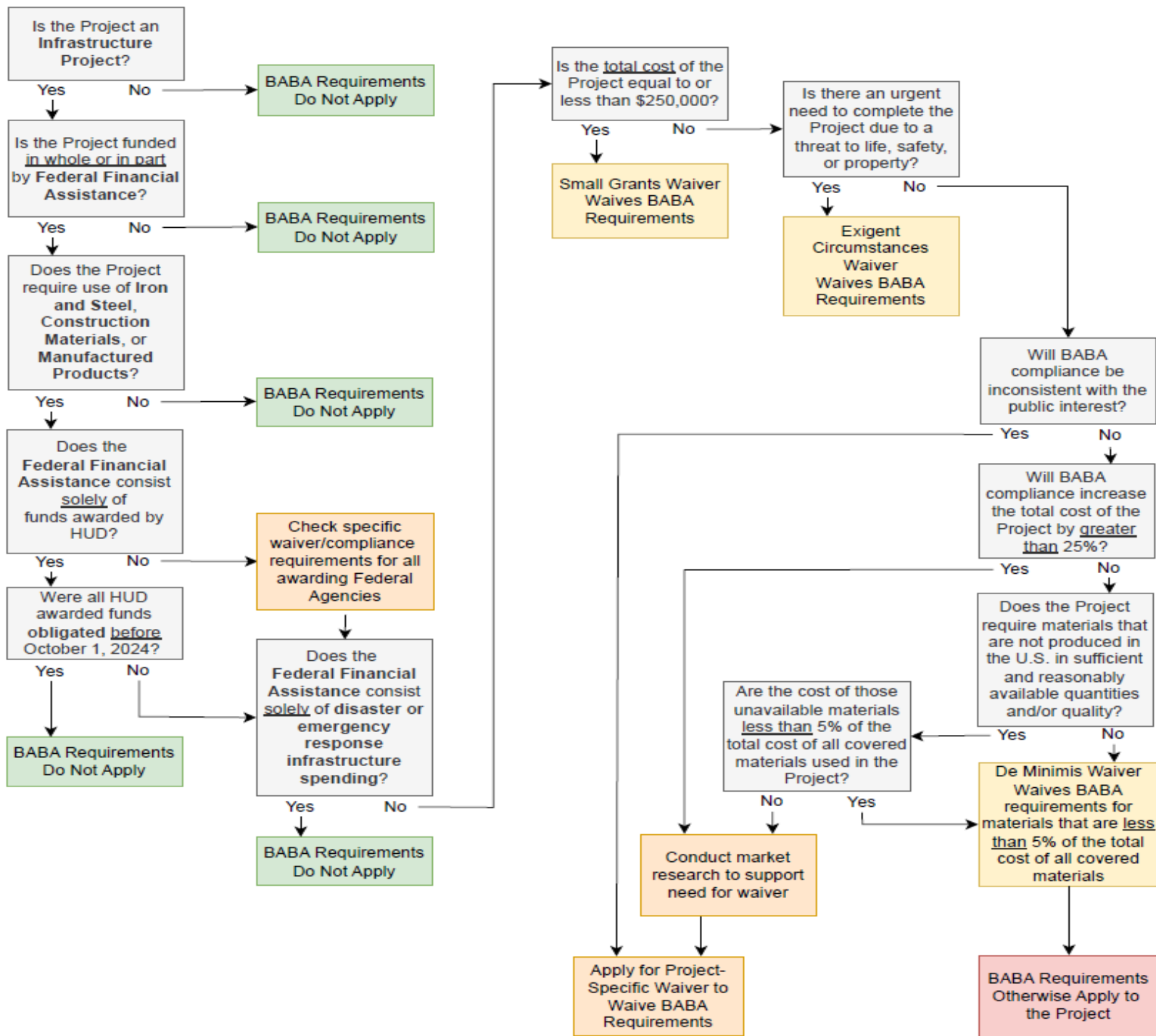
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Outline of BABA Presentation

- **What we will cover:**
 - Overview
 - Applicability of BABA
 - How to comply with BABA requirements
 - BABA procedures and compliance documentation
 - What waivers are available
 - Procedures for addressing noncompliance

Overview of BABA

- **Buy America Preference (BAP):**
 - Each Federal agency (e.g., HUD) must ensure that none of the funds used for a Federal award for an Infrastructure Project are obligated unless all of the iron, steel, manufactured products, and construction materials incorporated into the project are produced in the US
- **BABA regulations:** located at 2 CFR Part 184 and incorporated into 2 CFR Part 200
- The U.S. Office of Management and Budget (OMB) will be regulating and enforcing the BABA requirements, through its Made in America Office (MIOA)



What is an Infrastructure Project?

- **“Infrastructure Project”** means any activity related to the construction, alteration, maintenance, or repair of infrastructure in the United States regardless of whether infrastructure is the primary purpose of the project
 - “Infrastructure” includes buildings, real property, roads, utilities, etc.
 - OMB has issued guidance that BABA does **not** apply to projects involving the construction, maintenance, alteration, or repair of **buildings of 1 – 4 dwelling units** (we are awaiting further clarification from HUD on the scope of this guidance)
 - Projects cannot be artificially subdivided to avoid BABA requirements

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 following forms (as well as others not listed here):
 - 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 Tribes/TDHEs

- HUD grants subject to BABA:
 - 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 is NOT Federal Financial Assistance?

- Amounts received as reimbursement for services rendered to individuals
- Tribal HUD-VASH
- Section 184 Indian Housing Loan Guarantee program.
- Expenditures for assistance under the Robert T. Stafford Disaster Relief and Emergency Act or relating to a major disaster/emergency
- 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, for Presidentially declared disasters or emergencies
 - NHHBG-ARP

Partial Federal Financial Assistance Funding and Pass-Through Funding

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

Applicability of BABA Requirements to Federal Financial Assistance

- BABA requirements do **not** apply to funds **obligated** by HUD to tribes/tribally designated housing entities (Tribes/TDHEs) prior to September 30, 2024
 - BABA requirements **do** apply to funds obligated by HUD to Tribes/TDHEs 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 in 2025, and then uses that federal funding to build a \$1,000,000 ten unit apartment complex, with the TDHE to act as the general contractor. The tribe contracted with the TDHE through its standard procurement process. Does the TDHE need to ensure that the project complies with BABA, even though the Tribe is the primary recipient of the funding?

Answer

Yes. The BABA requirements apply to all Federal Financial Assistance and do not distinguish between the end user of the federal funds. The BABA requirements apply so long as the funding is derived from a Federal agency, even if they are initially received by a pass-through entity

Hypothetical #2

A Tribe/TDHE plans to use Tribal (nonfederal) funds to start the construction of 10 Tribal houses in January 2025 and then plans to add \$500,000 of 2024 IHBG Competitive funds to the project later.

- A. The Tribe/TDHE procures steel beams for the houses, before the Tribe/TDHE receives the 2024 IHBG Competitive funds. Does the Tribe/TDHE need to make sure those steel beams meet BABA?
- B. After the Tribe/TDHE adds the 2024 IHBG Competitive funds to the project, the Tribe/TDHE procures other construction materials for the houses using Tribal funds. Does that procurement need to comply with BABA?

Answer

- A. No.** Because no federal financial assistance has been added to the project *at the time* that the Tribe/TDHE procures steel beams, the project is not yet subject to BABA
- B. Yes.** After the Tribe/TDHE adds the 2024 IHBG Competitive funds, to the project, BABA applies to the entire project. Any covered materials (Iron, Steel, Manufactured Products, Construction Materials) must be made in America, regardless of what funding is used to procure the materials

Materials Subject to BABA

- BABA requirements only apply to Iron or Steel Products, Construction Materials, and Manufactured Products
- “Iron or Steel Products” means articles, materials, or supplies that consist wholly or predominantly of iron or steel or a combination of both
 - To be “produced in the United States” means that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the U.S.

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
- **To be “manufactured in the United States” means:**
 - 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 its components
 - This standard applies unless applicable law or regulation sets a standard that meets or exceeds this standard
 - The costs of components of a Manufactured Product are determined according to 2 CFR § 184.5

Construction Materials

- “Construction materials” include articles, materials, or supplies that consist of only one of the items listed below this definition, except as provided in of this definition.
 - 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 do not change the categorization of the Construction Material
- Items that consist of two or more of the listed Construction Materials that have been combined through a manufacturing process should be treated as Manufactured Products, rather than as Construction Materials
- Items that include at least one of the listed materials in the Construction Materials definition, combined through a manufacturing process with a material that is not listed, should be treated as Manufactured Products, rather than as Construction Materials
 - 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
- “Optical fiber”: All manufacturing processes, from the initial preform fabrication stage through the completion of the draw, must occur in the United States

Construction Materials (Cont'd)

- “Lumber”: All manufacturing processes, from initial debarking through treatment and planning, must occur in the United States
- “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 BABA
 - 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-funded Infrastructure Project, consider whether a general applicability waiver exists that might cover the project.
 - If it is not feasible to obtain American-made materials, Tribe/TDHEs can apply for a project-specific BABA waiver
- HUD’s general public interest waivers include:
 - De Minimis Waiver
 - Small Grants Waiver
 - Exigent Circumstances 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 Tribe/TDHE 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

Contract Requirements

- Each bid document, subaward, contract, subcontract, purchase order, etc., should specifically require compliance with BABA and explain the BABA requirements.
- Bid documents 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)
 - The requirement that manufacturers and suppliers will be responsible for providing individual BABA certifications for all of the **three BABA materials**

Architect/Engineer & Contractor Procurement

- Bid documents should:
 - Provide an outline of the documentation and records retention requirements
 - Describe the specific terms that will be in all contracts (we will cover this later)
 - 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

- **Design/Engineering Projects:** For projects with design/engineering phases, the contract with the architect/engineer or design contractor should list the contractor's BABA responsibilities:
 - **Incorporate** BABA requirements into the project design;
 - **Research/evaluate** the availability of American-made materials
 - **Evaluate** the suitability of American-produced alternatives if only foreign-sourced materials are available
 - **Estimate costs** using American-made materials, highlighting cases in which using American-made materials will increase the overall project cost by more than 25%; if so, **creating a cost comparison** between American-made and foreign-sourced materials
 - **Identify** instances in which non-availability or unreasonable cost waivers may be needed and providing the Tribe/TDHE with the information required to draft such waivers

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
 - List BABA requirements in solicitations for bids from vendors for BABA-covered materials
 - Incorporate BABA requirements into bid documents and subcontracts, and ensure that BABA requirements are implemented during the design phase of the project

Contract Provisions

- Contracts should also require the contractor to:
 - Create and maintain thorough records of BABA compliance
 - Conduct market research to identify/use American-made materials
 - Identify any covered materials that are not domestically available
 - Identify time-sensitive project deadlines that could be impacted if a product is delayed or not available domestically
 - Identify instances in which non-availability or unreasonable cost waivers may be needed; provide the Tribe/TDHE with the information required to draft such waivers
 - Estimate costs using American-made materials; identify instances in which using American-made materials will increase the overall project cost by more than 25%; Create a cost comparison between American-made materials and foreign-sourced materials

Contract Provisions (Cont'd)

- Contracts should also require the contractor to:
 - Notify the Tribe/TDHE when materials have arrived on site
 - Inspect all covered materials delivered to the site prior to installation, to confirm BABA compliance
 - Provide all manufacturers' certifications to the Tribe/TDHE
 - Only install BABA-compliant materials
 - Reject shipments of any BABA non-compliant materials and ensure that a subcontractor does not invoice the Tribe/TDHE for non-compliant items
 - Report any non-BABA compliant materials or subcontractors to the Tribe/TDHE
 - Sign a BABA certification letter upon completion of the project

Contract Provisions (Cont'd)

- Contracts/bidding documents should make clear that it is the manufacturers'/suppliers' responsibility to inform the Tribe/TDHE if a BABA-compliant product initially promised is no longer available
- Contracts should state that installation of materials that are not BABA-compliant is considered defective work.
- To find BABA-compliant suppliers, use the Hollings Manufacturing Extension Partnership supplier scouting federal website:
<https://www.nist.gov/mep/supply-chain/supplier-scouting>

Procurement of Infrastructure Materials

- When procuring materials for infrastructure projects, Tribe/TDHEs must make sure the materials were made in America
- HUD and other federal agencies will require Tribe/TDHEs to **provide documentation** showing that the materials were made in America
- The Tribe/TDHE and/or Contractor should **collect country-of-origin information** on all the materials and components of products from contractors and suppliers

Procurement of Materials – Documentation

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

- A Made in America label showing 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 manufacture/supplier certificate or other documentation demonstrating or certifying that the materials were made in the U.S.
- A signed certification by the contractor certifying that to the best of their knowledge, all Iron, Steel, Manufactured Products, and Construction Materials installed on the project comply with BABA

Construction Phase

- Tribe/TDHEs should **reject** shipments of any non-BABA-compliant materials
- If a non-BABA-compliant material has already been installed, the contractor should immediately notify the Tribe/TDHE
 - The Tribe/TDHE must require the contractor to remove and return the foreign product, procure the equivalent domestically-produced product, and install it
- The Tribe/TDHE should obtain, create, and maintain thorough documentation for 3 years to demonstrate BABA compliance

Hypothetical # 3

A Tribe/TDHE receives three bid responses to a proposal. One bid is from an Indian-owned business that says they cannot comply with BABA (e.g., the business is small and they are unable to find BABA-compliant materials). Two bids are from non-Indian owned businesses that can comply with BABA within the project budget (e.g., a company such as Lowes that has the resources to make BABA compliance economically feasible). Which bidder must the Tribe/TDHE choose?

Answer

BABA would require the Tribe/TDHE to choose the non-Indian owned business. The Tribe/TDHE would be unable to meet both the Indian preference requirements and the BABA requirements.

However, HUD ONAP Guidance recommends that the Tribe/TDHE apply for a Unique Tribal Conditions waiver (a type of public interest waiver).

Hypothetical # 4

A Tribe/TDHE used non-federal funding to procure and order Construction Materials for an Infrastructure Project. The Tribe/TDHE then receives an FY 2025 IHBG grant to fund the project. The Tribe/TDHE ordered the Construction Materials before receiving the IHBG grant, but those Construction Materials were not paid for or delivered until after the Tribe/TDHE uses the IHBG grant for the project. Do those Construction Materials need to comply with BABA?

Answer

Most likely not. HUD has informally indicated that it will not require a Tribe/TDHE to retroactively apply BABA to materials already ordered. However, that approach could change with ongoing guidance and/or the incoming Presidential administration. If a Tribe/TDHE anticipates receiving and using federal funding for a project, we recommend including BABA requirements in the project contracts ahead of time.

Compliance Documentation

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

Overview of Waivers

- **Project-Specific Waivers:** A Tribe/TDHE may apply for a project-specific waiver from HUD and other federal agencies
 - Public interest
 - Non-availability of materials
 - Includes **Unique Tribal Circumstances Waivers**
 - Unreasonable Cost Waiver
- HUD General public interest waivers (no need to apply for these):
 - Small grants waiver (projects with less than \$250,000 FFA)
 - De minimis waiver (5% up to \$1 million of the BABA covered products)
 - Exigent circumstances

Overview of Waivers

- **Exigent circumstances waiver:**
 - Circumstances where undertaking the BABA-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.
 - Tribes/TDHEs don't need to apply and OMB doesn't need to approve it.
 - However, ONAP stated that they will require Tribes/TDHEs to provide documentation to support the need for that waiver, which ONAP will review during their normal audit process

Procedures for Addressing Noncompliance

- Tribe/TDHEs should develop procedures for addressing a contractor, manufacturer, or supplier's failure to comply with BABA
- Until HUD develops specific guidance, Tribe/TDHEs can follow the standard procurement procedures for addressing noncompliance:
 - Have a code of conduct
 - Develop procedures/policies describing the consequences for violations
- The procedures should state that installation of materials that are not BABA-compliant is considered defective work
- The procedures should stipulate the penalties, sanctions, and other remedies for violations/defective work

Any Questions?

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Thank You