



## **Build America, Buy America (BABA) Act Requirements in Pennsylvania Frequently Asked Questions (FAQ) Version 1.0**

### **What is BABA?**

The BABA Act is a federal Act signed into law on November 15, 2021, as part of the federal Infrastructure Investment and Jobs Act (IIJA) (Public Law 117-58). One of the BABA Act's goals is to improve the lives of Americans through an unprecedented level of federal investment in drinking water and wastewater infrastructure. It also intends to strengthen America's supply chain and support the manufacture of products and materials in the United States, leading to new investments, better paying manufacturing and construction jobs, and a resilient economy. Like the American Iron and Steel (AIS) requirement, the BABA Act requires domestic content procurement preferences for infrastructure projects that are funded in whole or in part with federal financial assistance by the Pennsylvania Infrastructure Investment Authority (PENNVEST). It requires that, effective May 14, 2022 – that is, 180 days after the enactment of IIJA – all projects implemented utilizing federal funds use iron, steel, manufactured products, and construction materials produced in the United States.

### **What are BABA requirements?**

- All the iron and steel used in an infrastructure project should be produced in the United States. This means that all the manufacturing processes from initial melting to application of coating must take place in the United States.
- Manufactured products used in an infrastructure project must be manufactured in the United States. This means that the cost of all components mined, produced, or manufactured in the United States must be greater than 55 percent of the total cost of all components of the manufactured product, unless another standard that meets or exceeds this standard has been established under applicable law or regulation for determining the minimum amount of domestic content of the manufactured product.
- Construction materials used in an infrastructure project must be manufactured in the United States. That is, all manufacturing processes associated with the construction materials occurred in the United States. Examples of construction materials typically used in drinking and wastewater infrastructure projects include items that are primarily made of non-ferrous metals, plastic and polymer-based products including polyvinylchloride (PVC), composite building materials, lumber and drywall. BABA does not apply to cement, cementitious materials, aggregates such as stone, sand, or gravel, aggregate binding agents or additives, or non-permanent products.

The iron, steel, manufactured products, and construction materials covered by BABA are those that are permanently incorporated into the infrastructure project. BABA requirements do not apply

to temporary items used to aid the completion of the project. Examples of temporary items would be shoring boxes, scaffolding and concrete forms.

### **How will a funding recipient know if this requirement applies to a project?**

In order to ensure that PENNVEST can maximize the use of both state and federal dollars, PENNVEST encourages potential applicants to prepare their projects to meet all state and federal funding requirements, including BABA. Once a project is approved by the PENNVEST Board for funding, the official funding requirements will be included in the PENNVEST funding agreement.

### **What does a funding recipient and/or project engineer need to do?**

1. Construction Contract Bidding Documents: Include in all bidding documents and construction contracts a requirement that the contractor:
  - Use iron and steel products, manufactured products, and construction materials made in the U.S. as required or request a waiver.
  - Solicit certifications from product manufacturers to document domestic production.
  - Create a De Minimis list for items that can meet the De Minimis waiver.

Example language that could be included in bid documents can be found in the BABA Implementation Procedure document found on the United States Environmental Protection Agency's (EPA) [BABA](#) webpage.

2. Materials Certifications: Obtain and maintain certifications from manufacturers, through the contractor, for each iron, steel, manufactured product, and construction material used on the project demonstrating that it was made in the U.S. The format for an acceptable certification is provided in the November 3, 2022 EPA memo, [Build America, Buy America Act Implementation Procedures for EPA Office of Water Federal Financial Assistance Programs](#). BABA Certifications are not needed for iron and steel products, manufactured products or construction materials that receive a waiver. In addition, certifications are not needed for those on the De Minimis list.
3. Waivers: Request a waiver from BABA requirements and use foreign-made iron and steel, manufactured products, and construction materials if the following EPA-approved waivers can be justified:
  - **Public Interest Waiver**: This may apply if domestic content procurement preferences are inconsistent with the public interest.
  - **Non-availability Waiver**: This may apply if the iron, steel, manufactured products, and construction materials needed for an infrastructure project are not produced or available in the United States in sufficient or reasonably available quantity.
  - **Unreasonable Cost Waiver**: This may apply if the iron, steel, manufactured products, and construction materials needed for an infrastructure project will increase the overall cost of the project by more than 25 percent.

In general, waiver requests should include:

- a. A brief summary of the project.

- b. A description and explanation of the need for the waiver for the product(s) in question.
- c. A brief summary of the due diligence conducted in search of domestic alternatives (which could include correspondence between assistance recipient and supplier/distributors).
- d. The quantity and materials of the product(s) in question.
- e. All engineering specifications and project design considerations relevant to the product(s) in question.
- f. The approximate unit cost of items (both foreign and domestic) in addition to an estimated cost of the materials and overall project.
- g. The date(s) product(s) in question will be needed on site in order to avoid significant project schedule disruptions.
- h. Any other pertinent information relevant to consideration of the waiver.
- i. Anticipated impact if no waiver is issued.

BABA Waiver requests should be submitted on a Waiver Request Form located on the Pennsylvania Department of Environmental Protection's (DEP) BABA webpage. Once completed, this document should be submitted to DEP's BABA Resource Account ([RA-EPBABA@pa.gov](mailto:RA-EPBABA@pa.gov)). DEP will review waiver requests for completeness and applicability prior to submission to EPA for approval.

**De Minimis General Applicability Waiver:** This is a public interest waiver that covers products used in or incorporated into a project that cumulatively comprise no more than five (5) percent of the **total project cost**. All applicable products covered by this waiver may be recorded using DEP's BABA De Minimis Template (or similar) and submitted to DEP. See the BABA Resources section on the DEP BABA webpage.

A complete list of approved and pending general applicability waivers can be found on EPA's [BABA Approved Waivers](#) webpage.

### **Does BABA compliance waive American Iron and Steel (AIS) requirements?**

No. However, per Section 70917(a) and (b) of the IIJA, the existing domestic procurement preference requirement under AIS is consistent with BABA for iron and steel. Procurement of construction materials and manufactured products, which are not covered under AIS, must be consistent with BABA requirements. So, if your project requires BABA compliance and you meet BABA compliance then AIS is met as well. There is no need to duplicate manufacturer certifications or De Minimis lists for both BABA and AIS. Guidance on this can be found in EPA's November 3, 2022 memo, [Build America, Buy America Act Implementation Procedures for EPA Office of Water Federal Financial Assistance Programs](#).

A BABA project-specific waiver approved by the EPA will be sufficient for the same product under AIS. A separate project specific waiver for AIS will not be required.

### **How does the project funding source affect BABA and AIS requirements?**

All projects funded with federal equivalency funds must meet BABA requirements. By meeting BABA requirements AIS requirements are also met. In addition, projects funded with non-equivalency federal recycled funds only need to meet AIS requirements. Federal requirements will be identified in your PENNVEST funding agreement.

**What is the difference in De Minimis waiver requirements between BABA and AIS?**

The De Minimis waiver under BABA applies to five (5) percent of the total project cost while the [De Minimis waiver under AIS](#) applies to five (5) percent of the total project materials cost. Note that the two waivers are not additive, that is, the five (5) percent under BABA cannot be added to the five (5) percent under AIS to make 10 percent. It is either one or the other. Also, note that the cost of any single item on the AIS De Minimis list may not exceed one (1) percent of the total project material cost. See [American Iron and Steel \(AIS\) Requirement in Pennsylvania, Frequently Asked Questions](#) on DEP's AIS webpage.

**Would BABA requirements apply only to the part of the project funded with federal funds?**

No. BABA requirements apply to the whole project even if it is only partly funded with federal funds.

**Does procurement through COSTARS imply that BABA requirements are automatically met?**

Procuring through COSTARS – the Commonwealth of Pennsylvania's cooperative purchasing program – does not mean you will automatically be meeting BABA requirements. PENNVEST funding recipients are advised to conduct the necessary due diligence to ensure that BABA requirements are met.

**Should language be included for BABA compliance for bid solicitations and contracts?**

Yes. The format for acceptable language for construction contracts is provided in Appendix 1 of the November 3, 2022 EPA memo, [Build America, Buy America Act Implementation Procedures for EPA Office of Water Federal Financial Assistance Programs](#).

Version History

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