

Build America, Buy America Act

Frequently Asked Questions (FAQ) Related to the Broadband Equity, Access, and Deployment (BEAD) Program

OVERVIEW

The Bipartisan Infrastructure Law (BIL), also known as the Infrastructure Investment and Jobs Act (IIJA), created the Broadband Equity, Access, and Deployment (BEAD) Program, which provides an unprecedented \$42.45 billion of federal investment to expand high-speed internet access to all Americans by funding planning, infrastructure deployment, and adoption programs in all 50 states, Washington D.C., and five U.S. territories.

As part of the IIJA, Congress adopted the Build America, Buy America (BABA) Act, which established a domestic content procurement preference across all Federal financial assistance programs for infrastructure. During 2023's State of the Union address, President Biden reaffirmed the government's commitments to both BEAD and BABA, saying, "We're making sure that every community . . . has access to affordable, high-speed Internet. And when we do these projects . . . we're going to buy American."¹

The Department of Commerce (DOC), in keeping with its mission to create the conditions for economic growth and opportunity for all communities, is ready to lead on implementing BABA. As we've seen already, this Buy America Preference will catalyze domestic manufacturing, build resilient supply chains, and drive U.S. job growth.

IMPLEMENTATION

The questions and answers in this document apply to the implementation of BABA requirements for the National Telecommunications and Information Administration (NTIA) BEAD Program. The purpose of this document is to answer the most frequently asked questions that we hear from manufacturers, internet service providers, trade associations, state broadband offices, and other parties interested in the BEAD Program. NTIA emphasizes that this FAQ must be read in conjunction with the following documents – most of which are available on DOC's BABA webpage:²

- DOC's *Limited General Applicability Nonavailability Waiver of the Buy America Domestic Content Procurement Preference as Applied to Recipients of Broadband Equity, Access, and Deployment Program*
- DOC's *Department-wide Public Interest Waivers of the Buy America Domestic Content Procurement Preference for: De Minimis Infrastructure Project Purchases, Small Grants, and Minor Components within Iron and Steel Products* (DOC *de minimis* Waiver)
- 2 CFR part 184 and 2 CFR part 200.

¹ President Joe Biden, 2023 State of the Union Address (Feb. 7, 2023) <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/02/07/remarks-of-president-joe-biden-state-of-the-union-address-as-prepared-for-delivery/>.

² <https://www.commerce.gov/oam/build-america-buy-america>

- Office of Management and Budget, Guidance for Grants and Agreements, 88 Fed. Reg 57,750 (Aug. 23, 2023) (OMB Final Guidance).³
- Office of Management and Budget (OMB) Memorandum M-24-02 , *Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure* (OMB M-24-02) (or any successor M-Memorandum or guidance).

This FAQ will be updated on an “as needed” basis. Additional implementation details for the BEAD Program, including guidance regarding the availability of any waivers, can be found in the BEAD Notice of Funding Opportunity (NOFO) and related technical assistance materials.⁴

The questions and answers below are for informational purposes only and are intended solely to assist potential applicants in better understanding the BEAD Program, the application requirements set forth in the NOFO for this program, and the application of the BABA provisions of the IIJA. The guide does not and is not intended to supersede, modify, or otherwise alter applicable statutory or regulatory requirements, or the specific application requirements set forth in the NOFO. In all cases, statutory and regulatory mandates, and the requirements set forth in the NOFO, shall prevail over any inconsistencies contained in the below information.

QUESTIONS AND ANSWERS

This FAQ is organized to provide responses to common questions in the following topic areas:

1. General
2. International Agreements
3. Calculation for Manufactured Products
4. Certification & Compliance
5. Guidance on Existing Waivers
6. Additional Topics

SECTION 1: GENERAL

- Q1.1: *What is an “infrastructure project” for the purposes of applying BABA to BEAD awards?*
 - A1.1: 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. *See* 2 CFR § 184.3. Infrastructure projects include, but are not limited to, broadband infrastructure, and may also include other BEAD-funded activities. *See* 2 CFR § 184.4(c).
- Q1.2: *What is the scope of a broadband infrastructure project for the purposes of the BEAD Program and the BABA rules?*

³ Available at <https://www.govinfo.gov/content/pkg/FR-2023-08-23/pdf/2023-17724.pdf>.

⁴ *See* Broadband Equity, Access, and Deployment Program Notice of Funding Opportunity, <https://broadbandusa.ntia.doc.gov/sites/default/files/2022-05/BEAD%20NOFO.pdf>; Broadband Equity Access and Deployment Program, <https://broadbandusa.ntia.doc.gov/funding-programs/broadband-equity-access-and-deployment-bead-program>.

- BABA defines “infrastructure project” to mean “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.”⁵ This encompasses the term “project,” which for purposes of the BEAD Program, is defined as “an undertaking by a subgrantee under this section to construct and deploy infrastructure for the provision of broadband service.”⁶
 - For purposes of the BEAD Program, broadband infrastructure extends to the device that terminates service to the location served.⁷
 - For example, in an end-to-end fiber optic deployment, the broadband infrastructure project would terminate at the Optical Network Terminal (ONT) or Optical Network Unit (ONU) at the customer premises, whether that ONT/ONU is a standalone ONT/ONU or a combined ONT/ONU.⁸ In a fixed wireless network, the broadband infrastructure project would terminate at the subscriber radio.
 - For purposes of the BEAD Program, broadband infrastructure does not include consumer/customer premises equipment, such as standalone household routers used downstream of an ONT/ONU.⁹
 - A broadband infrastructure project includes all activities related to the construction, alteration, maintenance, or repair of BEAD-funded broadband infrastructure,¹⁰ regardless of the number of contracts or assistance agreements involved, so long as all the contracts and assistance agreements awarded are closely related in purpose, time, and place. Recipients and subrecipients may not intentionally split projects into separate and smaller contracts or assistance agreements to avoid BABA on some portions of a larger project.
 - Note that other construction under BEAD that is not related to broadband deployment may also be subject to BABA. *See* 2 CFR § 184.4(c).
- Q1.3: *If most of the project is BABA compliant, and a small portion is not, can a funding recipient self-fund (i.e., pay with non-federal dollars for) the non-compliant products?*
 - A1.3: No. A Buy America preference applies to an entire infrastructure project, even if it is funded by both Federal and non-Federal funds under one or more awards (see OMB

⁵ 2 CFR § 184.3.

⁶ IJA § 60102(a)(2)(K).

⁷ This includes, but is not limited to, broadband network infrastructure such as fiber optic cable, optical network equipment, and electronics including fixed wireless and satellite broadband transmitters and receivers.

⁸ Combined ONT/ONUs are devices that provide the functions of an ONT or ONU, provide Ethernet and/or Wi-Fi access to the customer premises, and perform routing, security, and other management functions (*e.g.*, a combination ONT/gateway router that provides all ONT and gateway router functions on a single device). *See* BEAD BABA Waiver at 8.

⁹ *See* OMB M-24-02 at 4 (“A Buy America preference only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project. As such, it does not apply to . . . equipment and furnishings, such as movable chairs, desks, and portable computer equipment, that are used at or within the finished infrastructure project, but are not an integral part of the structure or permanently affixed to the infrastructure project.”) (emphasis added).

¹⁰ 2 CFR § 184.3.

M-24-02, Section IV). As noted in the final waiver of the Buy America Preference for the BEAD Program, the DOC *de minimis* Waiver can be applied to “other network equipment.” One hundred percent of the optical fiber, fiber optic cable, OLTs, rOLTs, OLT line cards, optic pluggables, standalone ONTs/ONUs, cabinets, Vaults, Pedestals, and closures and terminals used in BEAD-funded broadband infrastructure projects must comply with the Buy America Preference, as set forth in the final waiver.

- Q1.4: *Do products purchased with BEAD Program matching funds need to comply with BABA requirements?*
 - A1.4: Yes, the entire BEAD project, including purchases made with matching funds (regardless of source), must comply with the BABA requirements. See OMB M-24-02 Section IV, “A Buy America preference applies to *an entire infrastructure project*, even if it is funded by both Federal and non-Federal funds under one or more awards. In other words, if an infrastructure project receives a Federal award, the Buy America preferences applies to both the Federal funds and non-Federal funds used for the infrastructure project.” (emphasis in original).¹¹
- Q1.5: *Do the tools and equipment used to perform construction activities for a BEAD project need to be BABA compliant?*
 - A1.5: No. Per OMB M-24-02, “A Buy America preference only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project.”¹² See OMB M-24-02 for additional information about the applicability of BABA to equipment and supplies.
- Q1.6: *Do BABA requirements “flow down” to subrecipients?*
 - A1.6: Yes. All infrastructure projects funded by the BEAD Program, directly or indirectly, must comply with BABA. All Federal awards with infrastructure projects must include BABA requirements in the terms and conditions, and these requirements flow down to subawards and subrecipients. See 2 CFR § 184.4(b).

SECTION 2: INTERNATIONAL AGREEMENTS

- Q2.1: *How do recipients’ obligations under International Agreements, such as the WTO GPA, affect the application of the domestic content procurement preferences of BABA to infrastructure projects funded by the BEAD Program?*
 - A2.1: Several commenters filed comments regarding the treatment of international agreements under BABA. Federal financial assistance awards are generally not subject to international trade agreements because these international obligations generally only apply to direct Federal procurement activities by signatories to such agreements. The Federal Acquisition Regulation (FAR) addresses how international trade agreements implemented by the Trade Agreements Act apply to direct Federal procurement activities

¹¹ OMB M-24-02 at 4-5; see also OMB Final Guidance, 88 Fed. Reg at 57,768.

¹² OMB M-24-02 at 4.

of the U.S. at FAR subpart 25.4.¹³ A number of U.S. states have opted to obligate their procurement activities to the terms of one or more international trade agreements and, as such, are included in schedules to the international trade agreements. If a BEAD recipient is a state that has assumed procurement obligations pursuant to the Government Procurement Agreement or any other trade agreement, a Federal agency that applies a BABA preference to Federal awards may propose to waive BABA requirements in the public interest to allow a State to comply with its international trade agreement obligations. DOC will follow the procedures in Section 184.7 of the OMB guidance in 2 CFR part 184 and relevant supplemental guidance in OMB M-24-02 in evaluating waiver requests. For additional information, interested entities may also consult with the state in question or NTIA.

SECTION 3: CALCULATION FOR MANUFACTURED PRODUCTS

- Q3.1: *What is a “manufactured product”?*
 - A3.1: See 2 CFR § 184.3 for the definition of a manufactured product.
- Q3.2: *For the purposes of the BEAD Program, what does it mean for a manufactured product to be “produced in the United States”?*
 - A3.2: 2 CFR § 184.3 and Section III.A.2. of the BEAD BABA waiver define the requirements for manufactured products to be considered “produced in the United States.”
- Q3.3: *Will software, R&D cost, or labor count in calculating the cost of components for a manufactured product?*
 - A3.3: No. Note, however, that the BEAD BABA waiver identifies “[s]oftware integration (including firmware integration, installation of licensed software, and customer specific configuration)” as one of the manufacturing processes that must be conducted entirely within in the United States in order for certain electronics to be considered “produced in the United States.” See BEAD BABA Waiver Section III.A.2.a.

SECTION 4: CERTIFICATION & COMPLIANCE

- Q4.1: *Who is responsible for BABA compliance?*
 - A4.1: BEAD Program recipients and subrecipients are responsible for compliance with BABA.
- Q4.2: *How should subrecipients demonstrate that a particular product or project is compliant with the BEAD BABA waiver?*
 - A4.2: NTIA will release further guidance on reporting requirements.

¹³ See also FAR 25.1101, 25.1103, and 52.225-5

- Q4.3: *When will the BABA requirements be assessed for compliance?*
 - A4.3: A product must be compliant before it can be installed or used in a project. BEAD Program recipients and subrecipients must ensure they possess proper compliance documentation, prior to “use” of a product in a project. NTIA will release further guidance on reporting requirements.
- Q4.4: *How can companies prove that the fiber broadband equipment they make is BABA compliant?*
 - A4.4: NTIA will publish and maintain on the NTIA website a list of manufacturers that have certified compliance with the BABA requirements as well as the products of those manufacturers. Pursuant to 18 U.S.C. 1001, an officer of each of these companies has certified, subject to fine or imprisonment, that their products are compliant with the Buy America Preference.¹⁴ DOC will publish additional self-certification information in separate guidance.

SECTION 5: GUIDANCE ON EXISTING WAIVERS

- Q5.1: *How will DOC’s de minimis Waiver affect BEAD grants?*
 - A5.1: The *de minimis* Waiver’s small grant threshold will flow down through recipients to subrecipients. To the extent that there are classes or categories of Other Network Equipment used in broadband network deployments that are not domestically available, DOC expects that the DOC *de minimis* Waiver will be sufficient for most projects.
 - The DOC *de minimis* Waiver may not be applied to recipient or subrecipient purchases enumerated in the waiver, namely, construction materials like optical fiber or fiber optic cable in Section III.A.1, electronic manufactured products listed in Section III.A.2.a, nor to the types of enclosures listed in Section III.A.2.b.
 - NTIA will be cognizant of efforts by recipients and subrecipients to excessively compartmentalize projects to avoid BABA compliance.
- Q5.2: *Which stakeholders may apply for additional waivers?*
 - A5.2: NTIA will consider waivers on a case-by-case basis from Eligible Entities (i.e., recipients).
- Q5.3: *If a recipient has received a waiver on behalf of a subrecipient for a specific manufactured product, is that manufactured product waived for all BEAD subrecipients?*
 - A5.3: In considering waiver requests, NTIA may grant a project-specific waiver in addition to a program-wide waiver (called a “general applicability” waiver). If NTIA grants a project-specific waiver for a product under BABA, then that product would not be considered waived for all BEAD subrecipients—only for the subrecipient that received and is named in the waiver.

¹⁴ 18 U.S.C. § 1001.

NTIA anticipates that subrecipients will be using many of the same products in the BEAD Program. Accordingly, NTIA may adopt additional program-wide waivers when necessary and appropriate. That said, stakeholders should expect any waivers to be targeted to specific classes and categories of products, time-limited, and conditional.

SECTION 6: ADDITIONAL TOPICS

- Q6.1: *Can I buy equipment or materials from China?*
 - A6.1: Section 60102(g)(1) of the IIJA states that, “A subgrantee, in carrying out activities using amounts received from an eligible entity...may not use the amounts to purchase or support . . . fiber optic cable and optical transmission equipment manufactured in the People’s Republic of China, except that the Assistant Secretary may waive the application of this clause with respect to a project if the eligible entity that awards a subgrant for the project shows that such application would unreasonably increase the cost of the project.” This rule applies notwithstanding any waiver of the BABA rules. Additional prohibitions remain on certain telecommunications and video surveillance services or equipment found in 2 CFR § 200.216.