

**KENTUCKY INFRASTRUCTURE AUTHORITY**

# 

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Basic Requirements of the Build America, Buy America Act

The Build America, Buy America Act (BABA) requires that Kentucky’s Clean Water and Drinking Water State Revolving Fund Programs (SRF) that are funded by the federal government, comply with domestic preference requirements for iron and steel, manufactured products and construction materials.

1. All iron and steel items used in SRF projects funded by Fund A or Fund F must be produced in the United States. This means all manufacturing processes, from the initial melting stage through the application of coatings, occur in the United States. (A partial list of products likely made “primarily” of iron and steel to be classified as Iron and Steel under BABA can be found on Schedule A below.)

2. All manufactured products\* used in SRF projects funded by Fund A or Fund F are to be produced in the United States. This means the manufactured product was manufactured in the United States, and 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. (A partial list of manufactured products covered by BABA can be found on Schedule B below.)

\* The manufactured products category covers the majority of potential water infrastructure products, including complex products made up of a variety of material types and components. For water infrastructure projects, common manufactured products include, but are not limited to, pumps, motors, blowers, aerators, generators, instrumentation and control systems, gauges, meters, measurement equipment, treatment equipment, dewatering equipment, actuators, and many other mechanical and electrical items.

3. All construction materials\*\* used in SRF projects funded by Fund A or Fund F must be manufactured in the United States. This means that all manufacturing processes for the construction material must occur in the United States.

\*\*Construction Materials include an article, material, or supply—other than an item of primarily iron or steel; a manufactured product; cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives—that is or consists primarily of: non-ferrous metals; plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables); glass (including optic glass); lumber; or drywall.

Responsibility for BABA implementation applies at all levels, from manufacturers to suppliers and distributors, construction contractors, borrowers, and the Kentucky Infrastructure Authority. Manufacturers have the responsibility to provide adequate and accurate documentation of the products manufactured. If suppliers and distributors are involved, they are responsible for passing along compliance documentation for products. Borrowers and their representatives are primarily responsible for ensuring the documentation collected for products used on the project is sufficient to document compliance with the BABA requirements. The Kentucky Infrastructure Authority is responsible for providing oversight and guidance as needed to ensure the proper implementation of the requirements.

Assistance Agreements will require that borrowers comply with all federal requirements applicable to the assistance received (unless the borrower has requested and obtained a waiver or the project is otherwise covered by a general applicability waiver) and comply with all record keeping and reporting requirements. Assistance Agreements will also state that (i) each contract and subcontract related to the Project is subject to audit by appropriate federal and state entities and (ii) failure to comply with the applicable legal requirements and this Agreement may result in a default that results in a required repayment of the loan in advance of the maturity date.

Recipients and subrecipients must ensure their contracts, including purchase orders, include the required contract clause set forth on Appendix 1. All payment requests must include the following language: “By signing payment application and recommending payment, Contractor certifies they have reviewed documentation for all products and materials submitted for payment, and the documentation is sufficient to demonstrate compliance with Build America, Buy America Act requirements.”

Self-certifications (BABA Certification Letters) are required from manufacturers, suppliers and distributors throughout the construction process. These certification letters must include 5 key elements:

1. What is the product? (List product(s) delivered to the project site)

2. Where was it made? (Location(s) of the foundry/mill/factory where the product was manufactured (City and State))

3. Who was it delivered to? (Name of the project and/or jurisdiction delivered)

4. Signature of company representative. (Certifying official on company letterhead)

5. Reference to the BABA requirements. (it is OK if the certification lists more (USDA, DOT, FHA, etc.), but BABA is required).

In addition to compliance documentation, borrowers or their representatives should also conduct a visual inspection of the product when it arrives to the project site, especially for iron and steel products which are often stamped with the country of origin. (Note: A country of origin stamp alone is not sufficient verification of compliance with BABA and assistance receipts should not rely on it to ensure compliance.)

Waivers:

Requirements of the Build America, Buy America Act may be waived on the basis of (1) nonavailability, (2) unreasonable cost, or (3) public interest. Borrowers which have questions about waivers should contact the Kentucky Infrastructure Authority.

A Buy America Preference may be waived if: one or more iron or steel items, 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”); the inclusion of one or more iron or steel items, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25 percent (an “unreasonable cost waiver”); or applying the domestic content procurement preference for one or more iron or steel items, manufactured products, or construction materials would be inconsistent with the public interest (a “public interest waiver”).

Already Approved General Applicability Waivers:

Below are general waivers that have already been approved, but borrowers must still show that their projects qualify for one or more of these before these waivers are used.

DeMinimis Waiver: Products that qualify for a de minimis waiver cumulatively may comprise no more than a total of five percent of the total project cost.

Small Project Waiver: Small projects, where assistance agreements or subawards under assistant agreements are less than $250,000 may be able to waive the BABA requirements.

Adjustment Period Waiver: Any SRF projects that have initiated project design planning prior to May 14, 2022, can obtain a waiver. Note that there will be a sunset date for this waiver, but this date has not been set at this time.

Minor (Ferrous) Components of Iron and Steel Products General Applicability Waiver: Up to five percent of the total material cost of a product may include non-domestically produced miscellaneous minor iron or steel components without further need for a product-specific waiver.

Waiver process:

Borrowers and their authorized representatives may apply for a project specific waiver through the Kentucky Infrastructure Authority. To apply for a project-specific waiver, the borrower should email the request in the form of a Word document (.doc) or editable PDF (.pdf) to the Kentucky Infrastructure Authority at Natalie.lile@ky.gov. The Kentucky Infrastructure Authority will review the application for the waiver and determine whether the necessary information has been included.

Once the waiver application is complete, the Kentucky Infrastructure Authority will forward the application to the EPA. To fulfill the BABA requirements, the borrower must in good faith design the project (where applicable) and solicit bids for construction with American-made iron and steel, manufactured goods, and construction materials. It is essential that the borrower include the BABA terms in any request for proposals or solicitations for bids, and in all contracts (see Appendix 1 for sample construction contract language). The borrower may receive a waiver at any point before, during, or after the bid process, if one or more of three statutory conditions is demonstrated to EPA and approved.

Project-specific waiver requests should generally include:

1. a brief summary of the project,
2. a description and explanation of the need for the waiver for the product(s) in question,
3. a brief summary of the due diligence conducted in search of domestic alternatives (which could include correspondence between borrower and supplier/distributors),
4. the quantity and materials of the product(s) in question,
5. all engineering specifications and project design considerations relevant to the product(s) in question,
6. the approximate unit cost of items (both foreign and domestic) in addition to an estimated cost of the materials and overall project,
7. the date any products will be needed on site in order to avoid significant project schedule disruptions, and
8. any other pertinent information relevant to EPA’s consideration of the waiver (e.g., if relevant for SRF projects: whether the project is designated as an equivalency project, the date the plans and specifications were submitted to the state, the date of construction initiation, expected date of project completion, any special considerations such as local zoning and building ordinances, seismic requirements, or noise or odor control requirements).

As part of the cost waiver request, the borrower must demonstrate that implementation of the BABA requirements will increase the overall project cost more than 25 percent. Depending on the circumstances of the overall project cost increases, documentation to justify the cost waiver can vary but may include itemized cost estimates or bid tabulations comparing project costs with and without BABA implementation. Borrowers should begin assessing the potential cost impacts of the BABA requirements during the design phase of a project.

Questions??

If you have any questions, please feel free to e-mail Natalie.lile@ky.gov.

Schedule A

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| Products likely made “primarily” of iron and steel to be classified as Iron and Steel under BABA | | |
| Lined and Unlined Pipe | Lined and Unlined Fittings | Tanks |
| Flanges | Pipe Clamps and Restraints | Structural Steel |
| Valves | Hydrants | Pre-Cast, Iron/Steel Reinforced Concrete (of all types, regardless of iron/steel content percentage) |
| Manhole Covers and other Municipal Castings | Access Hatches | Ballast Screens |
| Iron or Steel Benches | Bollards | Cast Bases |
| Cast Iron Hinged Hatches | Cast Iron Riser Rings | Catch Basin Inlets |
| Cleanout/Monument Boxes | Construction Covers and Frames | Curb and Corner Guards |
| Curb Boxes | Curb Openings | Curb Stops |
| Detectable Warning Plates | Downspout Shoes | Drainage Grates |
| Drainage Grate Frames and Curb Inlets | Inlets | Junction Boxes |
| Lampposts | Manhole Rings and Frames | Manhole Risers |
| Meter Boxes | Service Boxes | Steel Hinged Hatches |
| Steel Riser Rings | Trash Receptacles | Tree Grates |
| Tree Guards | Trench Grates | Valve Boxes |
| Valve Box Covers and Risers | Access Ramps | Aeration Pipes and Fittings (separate from aeration/blowers) |
| Angles | Backflow Preventers/Double Check Valves | Baffle Curtains |
| Iron or Steel Bar | Bathroom Stalls | Beam Clamps |
| Cable Hanging Systems | Clarifier Tanks | Coiled Steel |
| Column Piping | Concrete Reinforcing Bar, Wire, and Fibers | Condensate Sediment Traps |
| Corrugated Pipe | Couplings | Decking |
| Digestor Covers | Dome Structures | Door Hardware |
| Doors | Ductwork | Expansion Joints |
| Expansion Tanks (diaphragm, surge, and hydropneumatics) | Fasteners | Fencing and Fence Tubing |
| Fire Escapes | Flanged Pipe | Flap Gates |
| Framing | Gate Valves | Generic Hanging Brackets |
| Grating | Ground Testing Boxes | Ground Test Wells |
| Guardrails | HVAC Registers, Diffusers, and Grilles | Joists |
| Knife Gates | Ladders | Lifting Hooks, J-bar, Connectors within, and Anchors for Concrete |
| Lockers | Man Baskets and Material Platforms | Manhole Steps |
| Mud Valves | Municipal Casting Junctions | Non-mechanical (aka stationary) Louvers and Dampers |
| Overhead Rolling Doors/ Uplifting Doors (manual open, no motor) | Pipe Connectors | Pipe Hangers |
| Pipe Pilings (any type of steel piling) | Pipe Spool (pipe, flanges, connectors, etc.) | Pipe Supports |
| Pitless Adaptors | Pre-fab Steel Buildings/Sheds (simple structure, unfurnished) | Pre-stressed Concrete Cylinder Pipe (PCCP) |
| Railings | Reduced Pressure Zone (RPZ) Valves | Roofing |
| Service Saddles | Sheet Piling | Sinks (not part of eyewash systems) |
| Solenoid Valves | Stairs | Static Mixers |
| Stationary Screens | Surface Drains | Tapping Sleeves |
| Telescoping Valves | Tipping Buckets | Trusses |
| Tubing | Valve Stem Extensions | Valve Stems (excluding handwheels and actuators) |
| Wall Panels | Wall Sleeves/Floor Sleeves | Welding Rods |
| Well Casing | Well Screens | Wire |
| Wire Cloth | Wire Rod | Wire Rope and Cables |
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Schedule B

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| Products likely made “primarily” of iron and steel to be classified as Manufactured Products under BABA | | |
| Actuator Superstructures/ Support Structures | Aeration Nozzles and Injectors | Aerators |
| Analytical Instrumentation | Analyzers (e.g., ozone, oxygen) | Automated Water Fill Stations |
| Blowers/Aeration Equipment | Boilers, Boiler Systems | Chemical Feed Systems (e.g., polymer, coagulant, treatment chemicals) |
| Chemical Injection Quills | Chemical Injectors | Clarifier Mechanisms/Arms |
| Compressors | Controls and Switches | Conveyors |
| Cranes | Desiccant Air Dryer Tanks | Dewatering Equipment |
| Dewatering Roll-offs | Disinfection Systems | Drives (e.g., variable frequency drives) |
| Electric/Pneumatic/Manual Accessories Used to Operate  Valves (such as electric valve actuators) | Electrical Cabinetry and Housings (such as electrical boxes/enclosures) | Electrical Conduit |
| Electrical Junction Boxes | Electronic Door Locks | Elevator Systems (hydraulic, etc.,) |
| Emergency Life Systems (including eyewash stations, emergency safety showers, fire extinguishers, fire suppression systems including sprinklers  /piping/valves, first aid, etc.) | Exhaust Fans | Fall Protection Anchor Points |
| Fiberglass Tank w/Appurtenances | Filters (and appurtenances, including underdrains, backwash systems) | Flocculators |
| Fluidized Bed Incinerators | Galvanized Anodes/Cathodic Protection | Gear Reducers |
| Generators | Geothermal Systems | Grinders |
| Heat Exchangers | HVAC (excluding ductwork) | HVAC Dampers (if appurtenances to aerators/blowers) |
| HVAC Louvers (mechanical) | Intake and Exhaust Grates (if appurtenances to aerators/blowers) | Instrumentation |
| Laboratory Equipment | Ladder Fall Prevention Systems | Ladder Safety Posts |
| Lighting Fixtures | Lightning and Grounding Rods | Mechanical or Actuated Louvers/Dampers |
| Membrane Bioreactor Systems | Membrane Filtration Systems | Metal Office Furniture (fixed) |
| Meters (including flow, wholesale, water, and service connection) | Motorized Doors (unit) | Motorized Mixers |
| Motorized Screens (such as traveling screens) | Motors | Pelton Wheels |
| Pipeline Flash Reactors (similar to injectors) | Plate Settlers | Precast Concrete without Iron/Steel Reinforcement |

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| Products likely made “primarily” of iron and steel to be classified as Manufactured Products under BABA | | |
| Furnished Pre-fab Buildings (such as furnished with pumps, mechanics inside) | Presses (including belt presses) | Pressure Gauges |
| Pump Cans/Barrels and Strainers | Pumps | Mechanical Rakes |
| Safety Climb Cable | Sampling Stations (unless also act as hydrant) | Scrubbers |
| Sensors | Sequencing Batch Reactors (SBR) | Steel Shelving (fixed) |
| Slide and Sluice Gates | Spray Header Units | Steel Cabinets (fixed interior/furniture) |
| Supervisory Control and Data Acquisition (SCADA) Systems | Tracer Wire | Valve Manual Gears, Actuators, Handles |
| Voltage Transformer | Water Electrostatic Precipitators (WESP) | Water Heaters |
| Weir Gates |  |  |

APPENDIX 1

Example Build America, Buy America (BABA) Act Construction Contract Language

ALL CONSTRUCTION CONTRACTS MUST HAVE A CLAUSE REQUIRING COMPLIANCE WITH THE BABA REQUIREMENTS. THIS IS AN EXAMPLE OF WHAT COULD BE INCLUDED IN A PROJECT’S CONSTRUCTION CONTRACT. EPA MAKES NO CLAIMS REGARDING THE LEGALITY OF THIS CLAUSE WITH RESPECT TO STATE OR LOCAL LAW:

The Contractor acknowledges to and for the benefit of the \_\_\_\_\_\_\_\_\_\_ (“Owner”) and the \_\_\_\_\_\_\_\_\_\_\_\_\_ (the “Funding Authority”) that it understands the goods and services under this Agreement are being funded with federal monies and have statutory requirements commonly known as “Build America, Buy America;” that requires all of the iron and steel, manufactured products, and construction materials used in the project to be produced in the United States (“Build America, Buy America Requirements”) including iron and steel, manufactured products, and construction materials provided by the Contactor pursuant to this Agreement. The Contractor hereby represents and warrants to and for the benefit of the Owner and Funding Authority (a) the Contractor has reviewed and understands the Build America, Buy America Requirements, (b) all of the iron and steel, manufactured products, and construction materials used in the project will be and/or have been produced in the United States in a manner that complies with the Build America, Buy America Requirements, unless a waiver of the requirements is approved, and (c) the Contractor will provide any further verified information, certification or assurance of compliance with this paragraph, or information necessary to support a waiver of the Build America, Buy America Requirements, as may be requested by the Owner or the Funding Authority. Notwithstanding any other provision of this Agreement, any failure to comply with this paragraph by the Contractor shall permit the Owner or Funding Authority to recover as damages against the Contractor any loss, expense, or cost (including without limitation attorney’s fees) incurred by the Owner or Funding Authority resulting from any such failure (including without limitation any impairment or loss of funding, whether in whole or in part, from the Funding Authority or any damages owed to the Funding Authority by the Owner). If the Contractor has no direct contractual privity with the Funding Authority, as a lender or awardee to the Owner for the funding of its project, the Owner and the Contractor agree that the Funding Authority is a third-party beneficiary and neither this paragraph (nor any other provision of this Agreement necessary to give this paragraph force or effect) shall be amended or waived without the prior written consent of the Funding Authority.