

VDH Drinking Water Funding Program Guidance Package #14

Build America, Buy America (BABA) Act Requirements

All Virginia Drinking Water State Revolving Fund projects that (a) are designated as “equivalency” projects (i.e., projects funded in an amount equal to the state’s capitalization grant from EPA), and (b) that use federal infrastructure funding obligated on or after May 14, 2022, must comply with the Build America/Buy America (BABA) Act requirements in Title IX of the Bipartisan Infrastructure Law (Public Law 117-58). The Act requires the “equivalency” designated Virginia Drinking Water State Revolving Fund (VDWSRF) assistance recipients (owners) to use iron, steel, manufactured products, and construction materials that are permanently incorporated into an infrastructure project to be produced in the United States. The prime contractor must provide documentation that all such materials and products which are retained as permanent parts of the project are BABA compliant per the definitions outlined in the Virginia Department of Health (VDH) Contract Inserts for Projects Subject to BABA, Program Guidance Package #15.

The EPA’s BABA website is located at <https://www.epa.gov/cwsrf/build-america-buy-america-baba> and contains additional guidance, informational webinars, and a listing of approved and potential waivers.

Funding Recipient Responsibilities

The funding recipient must monitor all aspects of the project but in the case of BABA, the funding recipient has specific responsibilities:

1. Include the latest VDH Drinking Water State Revolving Fund contract inserts for projects subject to BABA in the contract documents.
2. Within 21 days of the determination of the apparent low bidder of the project, receive from the Prime Contractor, the Initial BABA General Certification (Attachment 10 of the Contract Inserts) and retain in project file.
3. During the Shop Drawing Review portion of the project, receive, review and forward to the VDH Financial and Construction Assistance Programs (FCAP) Project Manager for approval, individual BABA certification letters for all iron, steel, manufactured products, and construction materials to be permanently incorporated into the project that are supplied or installed by the prime contractor or subcontractors.

These letters must contain the following 5 elements and cannot be written in future tense:

- (1) The date, project name, project location, contract number, or project number.
- (2) Description of product(s), purchase order, invoice, or bill of lading.
- (3) Statement that the products supplied to the project are compliant with BABA requirements under the Bipartisan Infrastructure Law (a.k.a, Infrastructure Investment and Jobs Act (“IIJA”)). Iron and steel items certified using the American Iron and Steel

(AIS) certification process will also satisfy the BABA certification requirements. AIS requirements are covered in Program Guidance Package #12.

(3a) BABA certification letters must also list the applicable product category (e.g. manufactured product or construction material)

(4) Location(s) of manufacturing for each manufacturing step that is being certified. It is acceptable for manufactured products to note a single point of manufacturing, documenting that the final point of manufacturing is in the United States.

(5) Signature of company representative (on company letterhead and signature can be electronic).

4. Prior to requesting the Final Payment Reimbursement, provide the FCAP Project Manager a copy of the Final BABA General Certification (Attachment 13 of the Contract Inserts) from the Prime Contractor certifying that the original certification is still valid or document any changes or substitutions, and retain in the project file.
5. The owner may refuse payment for any BABA component until a satisfactory certification is received. Also, VDWSRF may withhold reimbursement request payment on any BABA components for which certification is not available upon request by VDWSRF.
6. Retain summary reports and records of the Prime Contractor's *De Minimis* incidental components if utilized by the contractor. Details of this *De Minimis* national waiver and other waivers can be found in the Contract Inserts for Projects Subject to BABA Requirements, Program Guidance Package #15.
7. The owner requests waivers of BABA requirements and has sole discretion on the decision whether or not to request a waiver suggested by the prime contractor. Waiver requests and waiver review checklists are first submitted to the FCAP Project Manager for review for completeness (Attachments 11 & 12 of the Contract Inserts). FCAP may approve *De Minimis*, Small Project, and Adjustment Period waiver requests, but Cost and Product Non-Availability waivers must be approved by the EPA. Further details of the waiver process are in the Contract Inserts.

The VDH Financial and Construction Assistance Programs or EPA may monitor the performance of the funding recipient in its enforcement and compliance of the BABA requirements. Certification records shall be maintained by the contractor and each subcontractor for a period covering three years from the date of completion of the contract. The funding recipient shall also maintain their records of certification actions for at least three years after completion of the work.

Preconstruction Conference

The funding recipient shall hold a preconstruction conference. One purpose of the preconstruction conference is to apprise the contractor and all available subcontractors of their responsibilities and obligations concerning compliance with BABA requirements.

Enforcement and Corrective Actions

The contractor or subcontractor shall make the records required available for inspection, copying, or transcription by authorized representatives of the owner, VDH, or the EPA. Failure to submit the required records upon request or to make such records available may be grounds for withholding of funding reimbursement payment.

The owner may refuse payment for any BABA component until a satisfactory BABA certification is received.

If changes or substitutions are disallowed by EPA, part or all of the funding may be forfeited by the owner. As State or Federal law permits, the owner may seek damages from the contractor.