



Comment on OHFA 4%+ BGF Guidelines: BABA Waiver Submission Timing

We respectfully request that OHFA reconsider the proposed requirement that all Build America, Buy America (BABA) waivers be fully completed and submitted at the time of the LIHTC application.

Based on our experience with projects that are subject to BABA requirements, the information necessary to complete a final waiver is generally not available at the time of an LIHTC application. BABA waivers can require project-specific information regarding the actual materials being procured, the manufacturers and suppliers of those materials, and the availability of compliant domestic products. In practice, this information is typically not known until significantly later in the development process, after the general contractor and subcontractors have been selected, procurement has commenced, and specific materials and manufacturers have been identified. Additionally, HUD's BABA guidance contemplates that waiver requests be supported by documented market research, supplier outreach, domestic sourcing efforts, manufacturer correspondence, pricing information, and evaluation of alternative products. These activities are dependent upon actual procurement conditions and cannot be meaningfully completed before the project team, suppliers, and products have been identified.

Under the proposed timeline, applicants would be required to submit final BABA waivers in February 2027, potentially 8-12 months or more before closing and well before the project has entered the construction procurement process. At that point, many applicants will not yet have a finalized contractor or subcontractor team, approved product submittals, or definitive information regarding the materials that will ultimately be procured. As a result, an applicant would necessarily have to base a waiver on projected or assumed materials rather than the actual circumstances of procurement.

We are concerned that requiring final waiver submissions at application may create both compliance challenges and unnecessary project risk. Construction materials, manufacturers, and suppliers can change between application and construction due to pricing, availability, lead times, substitutions, design development, and other factors. A waiver prepared based on preliminary assumptions at application may therefore no longer accurately reflect the project's actual procurement circumstances when construction occurs. Conversely, a material that initially appears to require a waiver may ultimately be available from a compliant domestic source once procurement actually begins.

We also believe that moving a construction-stage procurement determination into the LIHTC application stage may create an unnecessary burden for applicants without materially advancing BABA compliance. The objective should be to ensure that any required waiver is properly documented and supported when the applicable material is actually being procured, rather than requiring applicants to make potentially speculative determinations many months before procurement information is available.

Requiring completed waiver submissions at application would also necessitate significant predevelopment expenditures before an applicant knows whether the project will ultimately receive an award or proceed to closing. To prepare meaningful waiver requests, applicants would likely need to engage contractors, suppliers, consultants, and design professionals to perform extensive procurement-level due diligence, product identification, supplier outreach, certification reviews, market research, and compliance analysis well in advance of normal project milestones. These activities are typically performed during preconstruction and procurement, not during the LIHTC application process.



In effect, applicants may be required to undertake a substantial portion of construction procurement and BABA compliance activities before project feasibility, funding commitments, final design, contractor selection, and subcontractor procurement have been established. Such an approach would increase soft costs, create additional development risk, and may ultimately result in waiver requests based on assumptions rather than actual procurement conditions.

Our experience on active BABA-funded developments confirms that waiver identification and preparation is not the starting point of the process. Rather, it follows a sequence that generally includes confirmation of applicable funding sources, advancement of plans and specifications, contractor engagement, subcontractor and supplier outreach, product identification, market research, domestic sourcing review, development of waiver packages, and agency submission. Even where credits and funding have been awarded, a BABA consultant has been engaged, and closing is expected within the next several months, waiver requests continue to depend upon contractor procurement activities, subcontractor input, supplier responses, and evolving product selections. Requiring final waivers at the LIHTC application stage would effectively move the waiver process ahead of the very steps needed to support it.

Accordingly, we respectfully request that OHFA revise the proposed requirement to allow BABA waivers to be finalized and submitted at a later stage of the development process when the necessary procurement information is available. For example, OHFA could require applicants to identify anticipated BABA-sensitive product categories at application, including materials or equipment that have historically presented compliance challenges, while deferring actual waiver preparation and submission until the procurement phase when contractors, subcontractors, suppliers, pricing, and product selections have been established. Because domestic manufacturing capacity continues to expand and market availability changes over time, a material that may appear to require a waiver at application may ultimately be available from a compliant domestic source when procurement occurs.

This approach would better align the waiver process with existing HUD guidance, which requires recipients to conduct due diligence and actively search for compliant products before requesting nonavailability waivers. Those activities are most effectively performed when actual materials, suppliers, and procurement packages have been identified.

At a minimum, if OHFA intends to maintain an application-stage submission requirement, we request clarification that applicants may submit draft or preliminary waivers based on projected materials at application, with the ability to update and finalize those waivers once the contractor, subcontractors, suppliers, and actual materials have been identified.

We believe this approach would preserve OHFA's ability to monitor and enforce BABA compliance while aligning the waiver process with the actual timing of construction procurement. It would also avoid requiring applicants to make final procurement determinations based on information that, in many cases, simply does not exist at the time of application.

As presented above, we have extensive experience in affordable housing BABA projects and would welcome the opportunity to meet and speak in more detail regarding this aspect of the guidelines. We appreciate OHFA's willingness to accept public comments on the updated guidelines and look forward to working closely with OHFA throughout this project.