

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Public Interest Phased Implementation Waiver of Build America, Buy America Provisions as Applied to Recipients of HUD Federal Financial Assistance

AGENCY: Office of the Secretary, U.S. Department of Housing and Urban Development (“HUD”).

ACTION:

Notice.

SUMMARY:

In accordance with the Build America, Buy America Act (“BABA” or “the Act”) this notice advises that HUD is proposing a public interest waiver to further HUD’s phased implementation of the Buy America Domestic Content Procurement Preference (“Buy America Preference,” or “BAP”) for recipients of Federal Financial Assistance (“FFA”) provided by HUD. HUD previously issued a separate waiver covering all FFA obligated by HUD on or before November 14, 2022, including Community Development Block Grant (“CDBG”) formula grants. In order to fully focus on the successful implementation of the BAP in formula grants, one of HUD’s largest grant programs, HUD has determined that it is in the public interest to propose a new public interest waiver of the application of the BAP for all other FFA provided by HUD. HUD is proposing that this waiver cover all FFA obligated by HUD during the ninety (90) day period after its effective date, and retroactively apply to any FFA obligated on or after November 15, 2022, except for those funds utilized in connection with the purchase of iron or steel products in infrastructure projects funded by CDBG formula grants obligated by HUD on or after November 15, 2022. HUD is also, through this waiver, soliciting specific comment on the further phased implementation of the BAP in connection with the iron and steel products used in other non-CDBG formula grant FFA provided by HUD and in the full implementation of the BAP in connection with the use of construction materials and manufactured products in all infrastructure projects across HUD’s FFA programs.

DATES:

HUD published this proposed waiver on its website on November 3, 2022. Comments on the waiver proposed in this document are due on or before November 17, 2022. HUD will consider comments received and announce any subsequent changes to this waiver through a subsequent notice. If issued, the waiver would be applicable to awards that are obligated on the effective date of the waiver and eighty-nine (89) days thereafter for a total of ninety (90) days.

ADDRESSES:

Interested persons are invited to submit comments on this public interest, general applicability waiver. Copies of all comments submitted are available for inspection and downloading at www.regulations.gov.

To receive consideration as public comments, comments must be submitted through one of two methods, specified below. All submissions must refer to the above docket number and title.

1. Electronic Submission of Comments.

Interested persons may submit comments electronically through the Federal eRulemaking Portal at www.regulations.gov.

HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the www.regulations.gov website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

2. Submission of Comments by Mail. Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410-0500.

No Facsimile Comments. Facsimile (FAX) comments will not be accepted.

3. Public Inspection of Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8:00 a.m. and 5:00 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the submissions must be scheduled by calling the Regulations Division at (202) 708-3055 (this is not a toll-free number).

FOR FURTHER INFORMATION CONTACT: Joseph Carlile, Department of Housing and Urban Development, 451 Seventh Street SW, Room 10226, Washington, DC 20410-5000, at (202) 402-7082 (this is not a toll-free number). HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech and communication disabilities. To learn more about how to make an accessible telephone call, please <https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs>. HUD encourages submission of questions about this document be sent to BuildAmericaBuyAmerica@hud.gov.

SUPPLEMENTARY INFORMATION:

I. Build America, Buy America

The Build America, Buy America Act (“BABA” or “the Act”) was enacted on November 15, 2021, as part of the Infrastructure Investment and Jobs Act (“IIJA”). Public Law 117-58. The Act establishes a domestic content procurement preference, the BAP, for Federal infrastructure programs. Section 70914(a) of the Act establishes that no later than 180 days after the date of enactment, HUD must ensure that none of the funds made available for infrastructure projects may be obligated by the Department unless it has taken steps to ensure that the iron, steel, manufactured products, and construction materials used in a project are produced in the United States. In section 70912, the Act further defines a project to include “the construction, alteration,

maintenance, or repair of infrastructure in the United States” and includes within the definition of infrastructure those items traditionally included along with buildings and real property. Thus, starting May 14, 2022, new awards of FFA by HUD through a program for infrastructure, and any of those newly obligated funds then obligated by the grantee, are covered under BABA provisions of the Act, 41 U.S.C. 8301 note, unless covered by a waiver.

II. HUD’s Progress in Implementation of the Act

Since the enactment of the Act, HUD has worked diligently to implement the BAP. Consistent with the requirements of section 70913 of the Act, HUD produced a report identifying and evaluating all of HUD’s FFA programs for compliance with the BAP on January 19, 2022, by Federal Register notice “Identification of Federal Financial Assistance Infrastructure Programs Subject to the Build America, Buy America Provisions of the Infrastructure Investment and Jobs Act” (87 FR 2894). In order to ensure orderly implementation of the BAP across HUD’s programs, HUD published two general applicability waivers for HUD’s programs on May 3, 2022. The first notice, “General Applicability Waiver of Build America, Buy America Provisions as Applied to Recipients of HUD Federal Financial Assistance” (87 FR 26219), extended the implementation date for the BAP until November 14, 2022, unless covered by a subsequent waiver. Thus, no funds obligated by HUD before November 14, 2022, are subject to the BAP. The second notice, “General Applicability Waiver of Build America, Buy America Provisions as Applied to Tribal Recipients of HUD Federal Financial Assistance” (87 FR 26221), extended the implementation date for the BAP for Federal Financial Assistance provided to Tribal recipients for a period of one year. Additionally, HUD published a Request for Information “Request for Information Relating to the Implementation of the Build America, Buy America Act” to gather additional information necessary to fully implement the BAP for HUD programs and to adequately prepare necessary Paperwork Reduction Act notices relating to such implementation. (June 1, 2022, 87 FR 33193)

Following the expiration of the “General Applicability Waiver of Build America, Buy America Provisions as Applied to Recipients of HUD Federal Financial Assistance” (87 FR 26219), HUD will fully implement the BAP for purposes of the purchase of iron and steel products used in infrastructure projects funded with FFA provided by HUD through its CDBG formula grants obligated by HUD on or after November 15, 2022.

Additional details on HUD’s implementation of the BABA requirements can be found at https://www.hud.gov/program_offices/general_counsel/BABA.

III. Waiver Authority

Under section 70914(b), HUD and other Federal agencies have authority to waive the application of a domestic content procurement preference when (1) application of the preference would be contrary to the public interest, (2) the materials and products subject to the preference are not produced in the United States at a sufficient and reasonably available quantity or satisfactory quality, or (3) inclusion of domestically produced materials and products would increase the cost of the overall project by more than 25 percent. Section 70914(c) provides that a waiver under

70914(b) must be published by the agency with a detailed written explanation for the proposed determination and provide a public comment period of not less than 15 days.

IV. Public Interest, General Applicability Waiver of Buy America Provisions

The Office of Management and Budget's April 18, 2022 memorandum, "Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure" (M-22-11)ⁱ, encourages agencies to consider ways to provide the assistance to funding recipients that is necessary and effective for the implementation of the BAP, including consideration of phased implementation of BAP where appropriate.

In Fiscal Year 2022, HUD grantees will receive more than \$15 billion through the Department's programs where infrastructure is an eligible activity and may be subject to the BAP. For example, Community Development Block Grant ("CDBG") funds may be used for infrastructure projects (e.g., water and sewer improvements, street improvements, neighborhood facilities) or non-infrastructure uses (e.g., senior services, youth services, operation of food banks, administrative and planning expenses). HUD estimates that 40 percent of CDBG funds awarded in 2021 (\$1.4 billion of \$3.5 billion total) were used on infrastructure projects where the BAP could apply.

As HUD's previous Notices advised and as supported by several comments received during the comment period, many of HUD's programs may be subject to the BAP and have previously not required compliance with similar Buy America preferences. Because the potential application of BAP mandated by the Act is new to the majority of HUD's programs and Federal Financial Assistance ("FAA"), HUD is choosing to implement the BAP first with respect to all iron and steel products used in infrastructure projects funded with FFA provided by HUD through its CDBG formula grants on or after November 15, 2022. In order to focus on this implementation, HUD is proposing to waive the application of the BAP in connection with all other FAA. This will provide an additional limited period to allow for further consideration of the most efficient methods of implementation of the BAP across the remaining HUD programs for construction materials and manufactured products more generally. This waiver advances BABA by reducing the administrative burden to potential assistance recipients where the costs of uncertainty in compliance with BABA could distract from the focus on the efficient and effective implementation of BABA in one of HUD's largest FFA programs and allows for broader phased implementation once further clarity and guidance on the implementation is received. Failure to provide recipients such flexibilities could delay the award for infrastructure projects as grantees and funding recipients must exert considerable effort in accounting for the sourcing for miscellaneous, low-cost construction materials without the benefit of complete guidance on the Act's requirements.

Additionally, HUD believes that better coordination with HUD FAA recipients in the implementation of BABA will avoid unnecessary and undue hardship. Such a waiver will allow grantees and funding recipients to focus their efforts on such critical projects. Proposing this waiver is not an alternative to increasing domestic production. Rather this waiver will allow HUD to focus (particularly in the early phases of BABA implementation) on key products and

critical supply chains where increased U.S. manufacturing can best advance our economic and national security. This waiver will also allow grantees and funding recipients to continue with projects in connection with iron and steel products where Made in America requirements have long been contemplated - providing greater ease of implementation for HUD's CDBG formula grantees. Without this waiver, HUD grantee and funding recipient participation could be impacted, such as modification of current plans.

As HUD's previous Notice advised and as supported by several comments received during the comment period, many of the HUD's programs that may be subject to the BAP and have previously not required compliance with similar Buy America preferences. Because the potential application of BAP mandated by the Act is new to the majority of HUD's FFA programs, this waiver advances BABA by targeting the initial phased implementation to a well-developed industry in connection with infrastructure projects being undertaken by sophisticated CDBG formula grantees. HUD is seeking comment on the further implementation of the BAP but will focus specific attention to the full implementation of the BAP in connection with the use of iron and steel in infrastructure projects in other FFA programs utilizing HUD funds within this waiver period.

No funds obligated by HUD or the grantee/funding recipient during the period of the waiver that would be exempted from compliance with BAP as a result of the waiver will be required to apply the BAP.

V. Impact of this Waiver on other Federal Financial Assistance

No funds that have been obligated by HUD before November 14, 2022, or during the pendency of this waiver will require compliance with the BAP, with the exception of iron and steel products used in connection with infrastructure projects funded through CDBG formula grants obligated by HUD on or after November 15, 2022 or unless otherwise required by another FFA award. Where the BAP or other BABA requirements are made applicable to a project of a grantee or funding recipient by another Federal agency, those requirements are not waived by this waiver, nor is the grantee or funding recipient exempt from the application of those requirements in accordance with the requirements of the Federal Agency providing such Federal Financial Assistance.

VI. Assessment of Cost Advantage of a Foreign-Sourced Product

Under OMB Memorandum M-22-11, "Memorandum for Heads of Executive Departments and Agencies," published on April 18, 2022, agencies are expected to assess "whether a significant portion of any cost advantage of a foreign-sourced product is the result of the use of dumped steel, iron, or manufactured products or the use of injuriously subsidized steel, iron, or manufactured products" as appropriate before granting a public interest waiver.ⁱⁱ HUD's analysis has concluded that this assessment is not applicable to this waiver, as this waiver is not based in the cost of foreign-sourced products. HUD will perform additional market research during the waiver period to better understand the market and to limit the use of waivers caused by dumping of foreign-sourced products.

VII. Solicitation of Comments on the Waiver

As required under section 70914 of the Act, HUD is soliciting comment from the public on the waiver announced in this Notice. In particular, HUD invites comments on the waiver of application of the BAP for iron and steel products in connection with infrastructure projects funded through HUD's FFA programs other than CDBG formula grants. HUD also seeks specific comment on how it may best further phase in the application of the BAP for all construction materials and manufactured products in connection with CDBG formula grants and all other HUD FFA programs. HUD invites comments on what time period would be appropriate for purposes of achieving these various phases of orderly implementation of the Act.

Footnotes

ⁱ See OMB Memorandum M-22-08, Identification of Federal Financial Assistance Infrastructure Programs Subject to the Build America, Buy America Provisions of the Infrastructure Investment and Jobs Act, <https://www.whitehouse.gov/wp-content/uploads/2021/12/M-22-08.pdf>.

ⁱⁱ See OMB Memorandum M-22-08, Identification of Federal Financial Assistance Infrastructure Programs Subject to the Build America, Buy America Provisions of the Infrastructure Investment and Jobs Act, <https://www.whitehouse.gov/wp-content/uploads/2021/12/M-22-08.pdf>