

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Docket No. FR-6331-N-06

**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: Final Notice.

SUMMARY: In accordance with the Build America, Buy America Act (“BABA” or “the Act”) this notice advises that HUD has issued 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. On May 5, 2022, 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 CDBG formula grants, one of HUD’s largest grant programs, HUD has determined that it is in the public interest to issue a new public interest waiver of the application of the BAP for all other FFA obligated by HUD. By this Notice, HUD announces that it is waiving the application of the BAP on or after the effective date of this waiver for all FFA obligated by HUD on or before February 21, 2023, 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. In addition, in the case of FFA obligated by HUD on or after November 15, 2022 but prior to the effective date of the final waiver, HUD is waiving the application of the BAP for all expenditures incurred on or after the date of the final waiver,

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.

DATES: As required under section 70914 of the Act, HUD published a new proposed public interest phased implementation waiver on its website on November 3, 2022. In addition, HUD published the proposed waiver in the Federal Register. Comments on that proposed waiver were initially stated to be due on or before November 17, 2022, but HUD extended the deadline to comment until November 21, 2022. Through this Final Notice, HUD is announcing that it has issued this waiver effective November 23, 2022. This waiver is effective as stated herein for FFA obligated on the effective date of the waiver and until February 21, 2023 for a total of ninety (90) days and, in the case of FFA obligated by HUD on or after November 15, 2022 but prior to the effective date of the final waiver, for all expenditures incurred on or after the date of the final waiver, 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.

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”) (Pub. L. 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, beginning 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 Federal Financial Assistance 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, on June 1, 2022 (87 FR 33193) 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.

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 published two additional long-term public interest waivers of the application of the BAP in exigent circumstances and in connection with Small Grants and *De Minimis* expenditures. Additionally, HUD determined that it will fully implement the BAP for purposes of the purchase of iron and steel products used in infrastructure projects funded with Federal Financial Assistance provided by HUD through its CDBG formula grants obligated by HUD on or after November 15, 2022, unless such purchases are covered by another applicable waiver issued by HUD. 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" ("OMB Memorandum 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 that 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 ("FFA"), 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 waiving the application of the BAP in connection with all other FFA provided by HUD. 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.

HUD believes that better coordination with HUD FFA 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. Issuing 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 also allows 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.

By this Notice, HUD announces that it is waiving the application of the BAP for all FFA obligated by HUD on or after November 23, the effective date of this waiver, and on or before February 21, 2023, 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. In addition, in the case of FFA obligated by HUD on or after November 15, 2022 but prior to the effective date of the final waiver, HUD is waiving the application of the BAP for all expenditures incurred on or after the date of the final waiver, 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.

As HUD’s previous Notice advised and as supported by several comments received during the comment period for that waiver, 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 intends to 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. Public Comments on the Waiver

As required under section 70914 of the Act, HUD solicited comment from the public on the public interest waiver announced in this Notice on its website and then published the proposed waiver in the Federal Register. A total of 15 comments were received in response to the proposed waiver. HUD thoroughly reviewed and considered each of the comments in determining to move forward with the issuance of this waiver as published in this Final Notice. The comments were supportive of the orderly implementation of the BAP, but were varied in the commenters' recommendations as to how to best accomplish such implementation.

A few commenters expressed support for a waiver of broader scope, potentially excluding all affordable housing programs from requirements to apply the BAP. A similar number of commenters requested that HUD move more expeditiously to fully implement the BAP across all HUD FFA programs. HUD appreciates the comments from both perspectives, but believes that the strategic implementation of iron and steel purchase requirements of the BAP in connection with CDBG formula grants obligated by HUD on or after November 15, 2022, is an

appropriate first step towards the appropriate implementation of the BAP. Such a measured step forward in implementation of the Act represents an appropriate balancing of the intent of the Act with the public interest in the continued efficiency and success of infrastructure projects funded through HUD's affordable housing and community development programs, the majority of which have not previously been subject to Buy America requirements to the extent of those included in the BAP. HUD therefore declines to alter the scope of the proposed phased implementation waiver at this time. HUD will continue to monitor the implementation of the BAP across its programs to ensure the most robust application possible in light of the important public interests discussed above.

Several proponents of the waiver requested that HUD provide guidance regarding the implementation of the BAP and extend this waiver until after the provision of such guidance. HUD appreciates these comments as well and will continue to work to develop robust guidance regarding the implementation of the BAP across its programs. HUD remains committed to reviewing its plans to provide for the effective and efficient implementation of the Act across its programs but is declining to extend the term of this waiver at this time.

V. Impact of This Waiver on Other Federal Financial Assistance

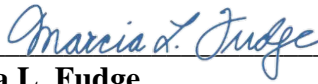
No funds that have been obligated by HUD on or before November 14, 2022, or during the pendency of this waiver will require compliance with the BAP, with the exception of iron and steel products used in connection with infrastructure projects funded through CDBG formula grants obligated by HUD on or 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, 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. 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.

Dated: 11/23/2022



Marcia L. Fudge
Secretary

[Billing Code 4210-67]

ⁱ <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>