



[Docket No. FR-6331-N-02]

General Applicability Waiver of Build America, Buy America Provisions as Applied to Tribal 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, this notice advises that HUD is proposing a general applicability waiver for one year to the Buy America Domestic Content Procurement Preference (“Buy America Preference,” or “BAP”) as applied to Federal Financial Assistance provided to Tribes, Tribally Designated Housing Entities (TDHEs), and other Tribal Entities. In accordance with the Act, HUD has found that this general applicability waiver is in the public interest, as it provides the Department with the opportunity to first engage in consultation as described in HUD’s Tribal Government-to-Government Consultation Policy, consistent with President Biden’s “Tribal Consultation and Strengthening Nation-to-Nation Relationships” Memorandum regarding the potential application of BAP to such entities.

DATES: Comments on the proposed waiver set out in this document are due on or before May 14, 2022. This waiver is effective for one year after May 14, 2022, unless, after reviewing any comments, HUD publishes a subsequent notice in the Federal Register explaining any changes to its determination to issue the waiver.

ADDRESSES: Interested persons are invited to submit comments on the 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.

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). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Information Relay Service at (800) 877-8339 (this is a toll-free number). Copies of all submissions are available for inspection and downloading at *www.regulations.gov*.

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. 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 (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.

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 has produced a report that identifies and evaluates all of HUD’s Federal Financial Assistance programs with potentially eligible uses of funds that include infrastructure as defined by the Act to determine which programs would be in compliance with the BAP and which would be considered inconsistent with section 70914 of the Act and thus “deficient” as defined by section 70913(c) of the Act. The report was submitted to Congress and the Office of Management and Budget (OMB) and published in the Federal Register within 60 days after the date of enactment of the Act, on January 19, 2022. Specifically, HUD published the required report in a notice entitled “Identification of Federal Financial Assistance Infrastructure Programs Subject to the Build America, Buy America Provisions of the Infrastructure Investment and Jobs Act” in compliance with section 70913. 87 FR 2894. In the report, HUD erred on the side of over-inclusiveness in accordance with OMB guidance, finding that none of HUD’s discretionary funding programs reviewed to date fully meet the BAP requirements outlined in section 70914 of the Act and are considered “deficient” under the definition in section 70913(c). Since issuing the report, HUD

has held regular meetings with Departmental offices and consulted administrative and economic data to plan to implement the Act.

III. Waivers

Under Section 70914(b), HUD has 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. Information on this waiver may be found at the webpage at this link: https://www.hud.gov/program_offices/general_counsel/BABA.

IV. Public Interest in a General Applicability Waiver of Buy America Provisions for Tribes, TDHEs, and Other Tribal Entities

In this notice, HUD is seeking comment on a general applicability waiver of the BAP to HUD's Federal Financial Assistance awards to provide the Department with sufficient time to comply with HUD's Tribal consultation process. HUD's Tribal Government-to-Government Consultation Policy¹ was adopted in compliance with Executive Order 13175, "Consultation with Indian Tribal Governments," and outlines the internal procedures and principles HUD must follow when communicating and coordinating on HUD programs and activities that affect Native American Tribes. HUD's Tribal consultation policy recognizes the right of Tribes to self-government and facilitates Tribal participation and input in HUD's implementation of programs and Federal financial assistance directed to Tribal communities.

As HUD's previous Federal Register Notice advised, many of the Department's programs will be subject to the BAP and have previously not required compliance with similar Buy

¹ https://www.hud.gov/program_offices/public_indian_housing/ih/regs/govtogo_tcp. See also 81 FR 40893.

American preferences. In fiscal year 2022, Tribes, TDHEs, and other Tribal Entities will receive \$1 billion through the Department's programs where infrastructure is an eligible activity, and may be subject to the BAP. HUD believes that full compliance with the BAP will create ongoing demand for domestically produced products and deepen domestic supply chains. Because the potential application of BAP mandated by the Act would be new to the majority of HUD's programs and Federal Financial Assistance, HUD has not had the benefit of engaging in consultation pursuant to its Tribal Consultation policy concerning the application of the BAP to Tribes, TDHEs, and other Tribal Entities. Because of the significance and potentially wide scope of new requirements necessary to demonstrate compliance with BAP or to seek waivers of BAP for specific products or projects, it is imperative that HUD take time to engage in Tribal consultation and then fully consider information gathered through such consultation in determining how best to ensure compliance with the Act in connection with Federal Financial Assistance awards to Tribes, TDHEs, and other Tribal Entities. HUD believes that the Tribal consultation process is key to the successful implementation of the BAP across its covered Federal Financial Assistance programs funding infrastructure projects and that a full and meaningful Tribal consultation process will allow HUD to determine the potential impact of the Act's Buy America Preference on Tribal governments and communities and will inform a tailored implementation for Tribal recipients that recognizes the sovereignty and unique status of Tribal governments. Therefore, HUD has determined that it would be contrary to the public's interest to apply the BAP prior to completion of these Tribal consultation processes. HUD is hereby waiving the application of the BAP to its Federal Financial Assistance awards to Tribes, TDHEs, and other Tribal Entities obligated for the duration of this waiver to allow sufficient time for completion of the Tribal consultation processes regarding how BAP should be applied to Tribes, TDHEs, and other Tribal Entities. HUD may choose to consult with Tribes in coordination with other Federal agencies that also fund Tribal infrastructure projects.

V. 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. 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.

VI. Limited Duration of the Waiver

HUD remains committed to the successful implementation of the important BAP across its programs providing covered Federal Financial Assistance for infrastructure projects, recognizing the unique relationship it has with Tribes, TDHEs, and other Tribal Entities receiving HUD Federal Financial Assistance for infrastructure projects. HUD is committed to engaging in a timely consultation process as noted above.

This waiver is effective as of May 14, 2022, and will remain in effect for all Federal Financial Assistance for infrastructure projects obligated to Tribes, TDHEs, and other Tribal Entities for one year, or until HUD publishes a notice extending the waiver or a final notice confirming the completion of HUD’s Tribal consultation process and announcing the termination of this general applicability waiver.

VII. Solicitation of Comments

As required under Section 70914 of the Act, HUD is soliciting comment from the public on the waiver. Please refer to the “**DATES**” and “**ADDRESSES**” sections of this notice for information on submission of comments.

Marcia L. Fudge
Secretary

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