



[Docket No. FR-6331-N-08A]

Public Interest *De Minimis* and Small Grants 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 departmentwide public interest *De Minimis* and Small Grants waiver to the Buy America Domestic Content Procurement Preference (“Buy America Preference,” or “BAP”) as applied to the iron, steel, manufactured products, and construction materials requirement of the Act for recipients of Federal Financial Assistance (“FFA”). For the purposes of this waiver, HUD has waived the application of the BAP for infrastructure projects whose total cost (including HUD funding and funding from any other source) is an amount equal to or less than the Simplified acquisition threshold, which is currently \$250,000. HUD has also waived the application of the BAP for all Small Grants of FFA provided by HUD that are equal to or below the Simplified acquisition threshold, which is currently \$250,000. However, if FFA provided by HUD is combined with other FFA from another Federal agency, and the total amount of FFA in a single project is greater than the Simplified acquisition threshold, currently \$250,000, then the waiver shall not apply to the FFA provided by HUD. Additionally, HUD has waived the application of the BAP for a *De Minimis* portion of an infrastructure project, meaning a cumulative total of no more than 5 percent of the total cost of the iron, steel, manufactured products, and construction materials used in and incorporated into the infrastructure project, up to a maximum of \$1 million.

In accordance with the Act, HUD has found that such *De Minimis* and Small Grants waivers are in the public interest. The waiver will assist HUD and its grantees and funding recipients in preventing immediate delays to critically important projects that serve to ensuring

the safety and health of HUD constituents and continuing to provide economic opportunity through housing and community development projects. Moreover, this waiver will assist HUD in working to strengthen the housing market to bolster the economy and protect consumers, meet the need for quality affordable rental homes, utilize housing as a platform for improving quality of life, and build inclusive and sustainable communities free from discrimination.

DATES: As required under section 70914 of the Act, HUD published this proposed waiver on its website on October 31, 2022, for public comment. In addition, HUD published the proposed waiver in the *Federal Register*. Comments on the proposed waiver set out in this document were due on or before November 15, 2022. Through this final notice, HUD is announcing that it has issued this waiver effective November 23, 2022. This waiver will remain effective for a period of five years or such shorter time period as HUD may announce via notice.

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 visit <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, starting May 14, 2022, new awards of FFA from a program for infrastructure, and any of those funds 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, through *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 (“FFA”) provided to Tribal recipients for a period of one year. HUD published a notice proposing the

waiver that is being finalized through this notice on its website on October 31, 2022, and via the *Federal Register*. 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 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 completing the infrastructure 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 in this 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) encourages agencies to consider whether it is in the public interest to waive application of a BAP to awards below the Simplified acquisition threshold. HUD is issuing this waiver not as an alternative to increasing domestic production, but as an important tool to implement the Buy American provisions in the most efficient manner. HUD understands that advancing Made in America objectives is a continuous effort. HUD plans to move forward to implement the new requirements in a way that maximizes coordination and collaboration to support long-term investments in domestic production.

Through this notice, HUD has waived the application of the BAP for infrastructure projects whose total cost (including HUD funding and funding from any other source) is an amount equal to or less than the 2 CFR 200.1 Simplified acquisition threshold, which is currently \$250,000. HUD has also waived the application of the BAP for all Small Grants of Federal

Financial Assistance provided by HUD that are equal to or below the 2 CFR 200.1 Simplified acquisition threshold, which is currently \$250,000. However, if FFA provided by HUD is combined with other FFA from another Federal agency, and the total amount of FFA in a single project is greater than the Simplified acquisition threshold, currently \$250,000, then the waiver shall not apply to the FFA provided by HUD. HUD has also waived the application of the BAP for a *De Minimis* portion of an infrastructure project, meaning a cumulative total of no more than 5 percent of the total cost of the iron, steel, manufactured products, and construction materials used in and incorporated into the infrastructure project, up to a maximum of \$1 million.

For purposes of the Act, an infrastructure project involves the undertaking of any “construction, alteration, maintenance, or repair” of “infrastructure,” which includes, among other things, the “structures, facilities and equipment” of “buildings and real property.”

In accordance with the Act, HUD has found that such *De Minimis* and Small Grants waivers are in the public interest. Such waivers will allow HUD, grantees and funding recipients to focus their efforts on such critical projects. Issuing the waivers is not an alternative to increasing domestic production. The waivers are in the interest of efficiency, to ease burdens for HUD grantees and funding recipients, and will also 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. These waivers will allow HUD grantees and funding recipients to continue with projects. Without these waivers, HUD grantee and funding recipient participation could be impacted, such as modification of current plans.

HUD is issuing this waiver to facilitate the effective implementation of the BAP and will therefore not permit the artificial subdivision of infrastructure projects to fit within the scope of this waiver of the BAP. Thus, for purposes of this waiver, HUD will evaluate the total cost of the infrastructure project as it would for purposes of the review contemplated under 24 CFR part 58, i.e., by defining the scope consistent with 24 CFR 58.2(a)(4), as “the activity, or a group of

integrally related activities, designed by the recipient to accomplish, in whole or in part, a specific objective.” HUD believes its grantees and recipients of FFA that will be used for infrastructure projects are familiar with this regulation and understand the proper application of the concept in connection with their activities, or as otherwise defined by HUD in a notice. However, in connection with the public housing program, evaluation of certain maintenance and repair activities within the definition of infrastructure projects under the Act is not appropriate using this standard. Therefore, for the purposes of determining the applicability of this waiver in connection with the maintenance and repair of public housing, HUD will evaluate the infrastructure project as including the single relevant procurement contract for such maintenance or repairs, or, where applicable, the collection of procurements focused on the same specific objective (e.g., construction of a resident service space) or limited scope of work (e.g., lead based paint abatement).

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 initial waivers advised and as supported by several comments received during the comment period on those waivers, many of HUD’s programs may be subject to the BAP and have previously not required compliance with similar Buy American preferences. Because the potential application of BAP mandated by the Act is new to the majority of HUD’s programs and FFA, this waiver advances BABA by reducing the administrative burden to potential assistance recipients where the costs of compliance with BABA could distract from the focus on higher

value BABA compliant items. Failure to provide recipients such flexibilities could delay the award for infrastructure projects as grantees and funding recipients must exert considerable effort accounting for the sourcing for miscellaneous, low-cost items. Moreover, HUD does not believe the waiver of the BAP for such awards will undermine the full and robust implementation of the Act or the ability of the agency to support the purposes behind the Act.

HUD expects to review this waiver every five years from the effective date of this waiver or more often as appropriate. No funds obligated by HUD or the grantee/funding recipient during the period of the waiver that are 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 14 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 generally favored a *De Minimis* and Small Dollar waiver as proposed.

A few commenters expressed support for a broader scope waiver, including requesting higher limits for a Small Grants exclusion, a higher percentage exclusion on portions of infrastructure projects, and a higher cap on the total cost under the *De Minimis* waiver. A similar number of commenters requested that the limits be lowered to afford more opportunities for the application of the BAP. HUD appreciates the comments from both perspectives, but believes that, as an initial matter, the limits proposed in the initial waiver are set at the appropriate levels to balance 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. HUD declines to make changes to the amounts represented by these limits at this time, but is clarifying that all FFA, whether received by HUD or from another Federal source, in

connection with infrastructure projects must be used to calculate the total, cumulative FFA in a single project to determine the applicability of a Small Grants waiver. 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 greater clarity regarding the implementation of the BAP and the appropriate application of this waiver. HUD appreciates these comments and will continue to work to develop robust guidance regarding the implementation of the BAP across its programs. HUD remains committed to reviewing the waivers it issues every five years or more often if necessary and appropriate.

A few comments were received from manufacturers and trade organizations that opposed portions of the proposed waiver because they would prefer a more narrowly tailored waiver, if a waiver is issued at all. These commenters expressed confusion over the reference to Minor Components in the proposed waiver. HUD agrees that use of the term Minor Components did not accurately reflect the waiver HUD was proposing. As a result, the waiver issued by HUD and announced via this final notice deletes all references to Minor Components and instead focuses on the true intent of the waiver – coverage for small grants and a *De Minimis* waiver.

Additionally, several of the opponents expressed concern that the waiver could give rise to a loophole to avoid compliance with the BAP. HUD appreciates the comments but believes that the waiver is sufficiently narrowly tailored with protections in place to avoid artificial manipulation of project size and that the risk of abuse is outweighed by the need to provide this important flexibility for Small Grants and the *De Minimis* portions of larger infrastructure projects. HUD expects the future guidance and technical assistance it provides to grantees regarding the implementation of the Act to further address any concerns that the scope or applicability of this waiver will be misconstrued by grantees. HUD will not allow the use of the waiver in any artificial or contrived circumstances designed to avoid the proper application of the BAP requirements. HUD has therefore declined to modify the waiver at this time, beyond the

clarification of the use of the cumulative total of all FFA funding the infrastructure project in determining application of this waiver. As previously indicated, HUD will continue to monitor the usage of the waiver so it may swiftly address any potential confusion concerning the proper application of the waiver.

The complexities of applying the BAP in connection with Small Grants and *De Minimis* portions of projects are such that the Agency maintains, for the reasons outlined herein, the public interest necessitates this waiver of the BAP. HUD will continue its work to assess compliance alternatives and options best suited to enable grantees and funding recipients to more efficiently and effectively implement the BAP in connection with Small Grants and *De Minimis* portions of infrastructure projects and will reevaluate this waiver in five years or sooner as appropriate. Additionally, HUD will continue to assess the need for and provide additional guidance for funding recipients and grantees to ensure the appropriate implementation of the BAP in its programs. At this time, however, HUD has issued this Small Grant and *De Minimis* waiver with the minimal substantive changes described herein and with other minor, inconsequential grammatical revisions.

V. Impact of this Waiver on other Federal Financial Assistance

Where the BAP or other BABA requirements are made applicable to projects of a grantee or funding recipient by another Federal agency, the grantee or funding recipient may not rely on this waiver as a waiver of any requirement imposed by the other Federal agency for the projects, 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 FFA.

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.ⁱ 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 duration of the waiver to better understand the market to limit the use of waivers caused by dumping of foreign-sourced products.

Marcia L. Fudge,
Secretary.

[Billing Code 4210-67]

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>.