



[Docket No. 6331-N-10]

Public Interest Phased Implementation Waiver for FY 2022 and 2023 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 of the Buy America Domestic Content Procurement Preference (“Buy America Preference,” or “BAP”) for recipients of Federal Financial Assistance (“FFA”) provided by HUD. When final, the waiver will provide an updated implementation schedule for application of the BAP to HUD FFA. HUD is also announcing its proposed BAP implementation schedule for all HUD FFA used to purchase iron or steel products in infrastructure projects in HUD programs other than the CDBG formula grants addressed in the November 23, 2022, waiver. HUD is also announcing its proposed BAP implementation schedule for the purchase of manufactured products and specified construction materials including: (1) non-ferrous metals; (2) lumber; (3) composite building materials; and (4) plastic and polymer-based pipe and tube (herein after referred to as “specified construction materials”).

DATES: HUD published this proposed waiver on its website on February 15, 2023. Comments on the waiver proposed in this document are due on or before March 2, 2023. HUD will consider comments received and announce any subsequent changes to this waiver through a subsequent Notice.

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). 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 www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.

FOR FURTHER INFORMATION CONTACT: Faith Rogers, Department of Housing and Urban Development, 451 Seventh Street SW, Room 10126, 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 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 HUD FFA, and any of those newly obligated funds by HUD then obligated by the grantee for infrastructure projects, 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. HUD understands that advancing Made in America objectives is a continuous effort and believes this transparent schedule of future implementation will provide industry partners and FFA recipients with the time and notice necessary to efficiently and effectively implement the BAP. HUD’s

proposed plans to move forward with the implementation of the new BAP requirements is designed to maximize coordination and collaboration to support long-term investments in domestic production. HUD will continue its efforts to implement the Act consistent with the guidance and requirements of the Made in America Office of the Office of Management and Budget, including anticipated guidance concerning appropriate compliance with the BAP. HUD is also, through this waiver, soliciting specific comment on the appropriate manner to implement the BAP in connection with the use of construction materials and manufactured products in all infrastructure projects across HUD's FFA programs.

In order to ensure orderly implementation of the BAP across HUD's programs, HUD has provided public interest, general applicability waivers in order to implement the BAP in phases in connection with the application of the BAP across HUD's FFA programs and to provide HUD with sufficient time to solicit information from the public relating to the agency's implementation of the BAP in connection with FFA awards made by HUD. HUD has previously published general applicability, public interest waivers to the BAP to provide the agency with sufficient time to solicit information from the public relating to the agency's implementation of the BAP in connection with FFA awards made by HUD. On November 23, 2022, HUD issued a separate waiver covering all HUD FFA obligated by HUD on or before February 21, 2023, with the exception of the BAP as to the purchase of iron and steel for infrastructure projects funded by Community Development Block Grant ("CDBG") formula grants on or after November 15, 2022. Separately, HUD waived the application of the BAP in connection with HUD FFA provided to Tribes, Tribally Designated Housing Entities ("TDHE"), and other Tribal Entities (referred to herein as "Tribal FFA") to allow time for HUD to complete the Tribal consultation process regarding implementation of the BAP in connection with infrastructure projects. This Notice does not apply to Tribal FFA covered by that separate waiver.¹

¹ General Applicability Waiver of Build America, Buy America Provisions as Applied to Tribal Recipients of HUD Federal Financial Assistance (Effective until May 14, 2023) address Tribes, Tribally Designated Housing Entities ("TDHE"), and other Tribal Entities' implementation of BABA. (May 5, 2022, 87 FR 26221).

Details on HUD's implementation of the BABA requirements, including two public interest waivers covering Exigent Circumstances and De Minimis and Small Grants and a separate public interest waiver for all Tribal FFA, can be found at 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), 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. Strategic and phased steps toward full BABA compliance refines the scope for what is exempt from BAP while providing a clear timeline for full implementation, consistent with the Congressional intent and stakeholder interest. It also allows HUD grantees and stakeholders the time needed to construct stronger supply channels to include new or amended vendor contracts that comply with BABA requirements.

In fiscal year 2023, HUD grantees will receive \$14 billion through the Department's programs where infrastructure is an eligible activity and may be subject to the BAP. For

example, Choice Neighborhoods (“CN”) funds may be used for infrastructure projects (e.g., transform severely distressed public and assisted properties with high-quality mixed-income) or non-infrastructure uses (e.g., business services, safety, children’s education and to improve employment, income, and health outcomes). HUD estimates that up to 85 percent of Choice Neighborhoods Implementation Grant funds to be awarded in 2023 (\$289 million of \$340 million total) will be used on housing and infrastructure projects where the BAP may 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 American preferences. Because the potential application of BAP mandated by the Act is new to the majority of HUD’s programs and FFA, HUD chose to implement the BAP first with respect to all iron and steel products used in infrastructure projects funded with HUD FFA on or after November 15, 2022, through its CDBG formula grants.

To focus its efforts on the implementation of the BAP for CDBG formula grants used to purchase iron and steel products as of November 15, 2022 and specified construction materials purchased with Fiscal Year 2024 CDBG formula grant and Recovery Housing Program funds used in infrastructure projects, HUD is proposing to waive the application of the BAP: 1) as to other programs for HUD FFA used to purchase iron and steel in addition to specified construction materials; 2) as to construction materials not specified in this Notice; 3) manufactured products for other programs and CDBG formula and Recovery Housing Program grants, consistent with the proposed implementation schedule set forth below:

	Iron and steel	Construction materials – Listed	Construction materials – not listed	Manufactured products
Tribes, Tribally Designated Housing Entities, and Tribal Entities	Not Addressed in this Notice. See note 1.	Not Addressed in this Notice. See note 1.	Not Addressed in this Notice. See note 1.	Not Addressed in this Notice. See note 1.

CDBG Formula Grants	November 15, 2022 – as described in the November 23, 2022 Final Waiver	Fiscal Year 2024	Fiscal Year 2025	Fiscal Year 2025
Choice Neighborhood, Lead Hazard Reduction, and Healthy Homes Production Grants	February 22, 2023	August 23, 2024	August 23, 2024	August 23, 2024
Recovery Housing Program (“RHP”) Grants	August 23, 2023	Fiscal Year 2024	Fiscal Year 2025	Fiscal Year 2025
All other HUD FFA except HOME, Housing Trust Fund, and Public Housing FFA used for maintenance projects	February 22, 2024	August 23, 2024	August 23, 2024	August 23, 2024
HOME, Housing Trust Fund, and Public Housing FFA used for maintenance projects	August 23, 2024	August 23, 2024	August 23, 2024	August 23, 2024

This proposed phased implementation, will allow for further consideration of the most efficient methods of implementation across the remaining HUD programs and for manufactured products and construction materials not specified in this Notice. The proposed waiver advances BABA by providing transparency in HUD’s implementation of the BAP, 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 an orderly and efficient manner, and provides transparency concerning the full implementation plans in connection with the purchase of iron and steel for infrastructure products. HUD anticipates that it may propose a new implementation schedule for construction materials in other programs, construction materials not specified in this Notice as to

other programs in addition to CDBG formula grant and Recovery Housing Program funds, and manufactured products for all HUD programs once further clarity and guidance on the implementation is available. Failure to provide recipients such flexibilities and transparency could delay the award for infrastructure projects as grantees and funding recipients must exert considerable effort in changing their plans and accounting for the sourcing of materials in construction projects without the benefit of complete guidance on the Act's requirements.

Additionally, HUD believes that better coordination in the implementation of BABA will avoid unnecessary and undue hardship that could jeopardize the timely and cost-effective completion of such projects as grantees and funding recipients that have previously not been subject to requirements similar to BAP await guidance on how to come into full compliance. Such a waiver will allow grantees and funding recipients to focus their efforts on such critical projects and allow HUD to focus its training and technical assistance on those grantees beginning the implementation process. Proposing this waiver is not an alternative to increasing domestic production. It is a tool to assist HUD in its implementation of the Buy American provisions in the most efficient manner in order to promote investment in HUD's domestic manufacturing base, strengthen critical supply chains, and position United States workers and businesses to compete and lead globally in the 21st century. This waiver is in the interest of efficiency, to ease burdens for HUD grantees and funding recipients, avoid unnecessary costs, and avoid delays to projects that are critical and time sensitive. This waiver 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. 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 grantees. Without this waiver, HUD will likely lose grantee and funding recipient participation, be exposed to liabilities if HUD forces grantees and funding recipients to modify their current

plans to come into compliance, or delay critical activities to protect life, safety and property, and will negatively impact the most vulnerable Americans we seek to serve.

As HUD's previous Notice advised and as supported by several comments received during the comment period, many of the 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 program FFA, this waiver advances BABA by targeting the next phase of implementation to include Choice Neighborhoods ("CN"), a place-based grant program which helps communities develop and implement locally driven comprehensive plans to transform neighborhoods. In Fiscal Year 2023, HUD received \$350 million for CN, which Public Housing Authorities and local jurisdictions apply for competitively. CN provides planning grants, which provide for the development of comprehensive plans, and implementation grants, which allow communities to implement their plans – including for use on infrastructure activities. This allows for efficient phased implementation while reducing the administrative burden to potential grantees and funding recipients where the costs of uncertainties surrounding 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. HUD is seeking comment on the further implementation of the BAP but will focus specific attention on the full implementation of the BAP in connection with the use of iron and steel in infrastructure projects in other FFA programs utilizing HUD FFA within this waiver period, except for Tribal FFA, and in connection with the use of specified construction materials in infrastructure projects funded by CDBG formula grant and Recovery Housing Program funds within this waiver period.

V. Impact of this Waiver on other FFA

HUD will not require compliance with the BAP in connection with the use of any HUD FFA obligated by HUD before November 14, 2022, or during the pendency of any other applicable BABA waiver issued by HUD, including this waiver, as applicable, after it is finalized. However, where the BAP or other “Buy American” 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 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. 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 its updated implementation schedule and corresponding waiver of application of the BAP in connection with infrastructure projects funded by HUD FFA. HUD also seeks specific comment on how it may best further phase in the application of the BAP: 1) as to other programs for HUD FFA used to purchase iron and steel in addition to specified construction materials; 2) as to construction materials not specified in this Notice; 3) manufactured products for other programs and CDBG

formula and Recovery Housing Program grants HUD invites comments on what time period would be appropriate purposes of achieving these various phases of orderly implementation of the Act.

If issued, the waiver would be applicable to HUD FFA that HUD obligates on or after the effective date of the final waiver and throughout the applicable waiver periods consistent with the implementation schedule as described above. Additionally, for HUD FFA obligated by HUD on or after February 22, 2023, but prior to the effective date of the final waiver described in this Notice, HUD would waive application of BAP for all expenditures incurred by grantees after the effective date of the Final Notice, consistent with the implementation periods described above.

Marcia L. Fudge,
Secretary.

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