



[Docket No. 6331-N-10A]

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 has issued 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 as set forth below. This notice provides a waiver and sets forth an updated implementation schedule for application of the BAP to HUD FFA. HUD is also announcing its 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 BAP implementation schedule for the purchase of four specifically-listed construction materials: non-ferrous metals; lumber; composite building materials; and plastic and polymer-based pipe and tube (herein after referred to as “specifically-listed construction materials”), all manufactured products, and all other construction materials.

DATES: March 15, 2023. This waiver is effective as stated herein for FFA obligated by HUD on or after the effective date of the waiver until the implementation deadlines for the BAP as specifically shown below.

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 <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 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 plans to move forward with the implementation of the new BAP requirements as set forth in this notice are 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.

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

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 https://www.hud.gov/program_offices/general_counsel/BABA.

III. Waiver Authority

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).

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.

As required under section 70914 of the Act, HUD published a proposed waiver on its website on February 15, 2023. In addition, HUD published the proposed waiver in the Federal Register. Comments on the proposed waiver were due on or before March 2, 2023. Through this Final Notice, HUD is announcing that it has issued this waiver effective March 15, 2023. This waiver is effective as stated herein for FFA obligated by HUD in listed programs on or after the effective date of the waiver until the implementation deadlines for the BAP as specifically shown below. In addition, in the case of FFA obligated by HUD in listed programs on or after February 22, 2023 but prior to the effective date of this Final Waiver, the waiver applies to all expenditures incurred on or after the effective date of the Final Waiver, except for FFA obligated by HUD after the deadline for implementation of the BAP with respect to the purchase of iron or steel products in infrastructure projects in CDBG formula grants, Choice Neighborhood, Lead Hazard Reduction, and Healthy Homes Production Grants. As such, through this Final Notice, HUD is expanding the application of the BAP to iron and steel products used in infrastructure projects funded with new Choice Neighborhood, Lead Hazard Reduction, and Healthy Homes Production Grants obligated by HUD on or after February 22, 2023. 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.

In connection with Choice Neighborhood grants, HUD is clarifying that this new required application of the BAP in connection with new Choice Neighborhood grants obligated by HUD on or after February 22, 2023, will not extend to supplemental awards obligated by HUD to enable the completion of ongoing, pre-existing projects funded by Choice Neighborhood grants obligated by HUD prior to February 22, 2023. HUD is continuing to waive the application of the BAP in connection with any obligation of supplemental Choice Neighborhood grants because they are merely serving to add additional resources to allow completion of projects well underway with funding obligated prior to the application of the BAP and any application of the BAP at this late stage of the project would be inconsistent with the public interest and could jeopardize completion of those projects. HUD believes that this application is consistent with the intent of the proposed waiver and clarifies that previous awards are not subject to conversion to BAP applicability merely by the addition of minimal funding needed to complete projects funded primarily with previous FFA Choice Neighborhood grant awards.

To focus its efforts on the implementation of the BAP for new FFA obligated by HUD on or after the dates shown below for each of the programs and for the items shown below, HUD is proposing to waive the application of the BAP: 1) as to FFA obligated by HUD and used to purchase iron and steel before the BAP implementation point shown below; 2) as to FFA obligated by HUD and used to purchase specifically-listed construction materials before the BAP implementation point shown below; 3) as to FFA obligated by HUD and used to purchase all construction materials not listed before the BAP implementation point shown below; and 4) as to FFA obligated by HUD and used to purchase any manufactured products before the BAP implementation point shown below. For purposes of HUD FFA, the BAP implementation point shall be the point shown in schedule set forth below. The table's columns describe four separate elements of the BAP and the rows describe various HUD FFA programs. The cells in the table set forth the point at which this waiver expires, and each element of the BAP becomes effective, for the various HUD FFA programs for each BAP element. Regarding the second column, the specifically listed construction materials under this waiver are: (1) non-ferrous metals; (2) lumber; (3) composite building materials; and (4) plastic and polymer-based pipe and tube. Regarding the two rows that reference new FFA HUD obligates from the appropriations for a particular fiscal year (*i.e.*, CDBG formula grants and RHP grants), except for iron and steel, the waiver will not expire on a single date for the entire program for any element of the BAP; instead, the waiver will remain effective and continue to waive the BAP for any FFA HUD obligates from the appropriations for prior fiscal years for the relevant element, but the waiver will not be effective for any FFA HUD obligates from the appropriations for the fiscal year referenced in the cell and following fiscal years, to which the relevant element of the BAP will apply. The implementation schedule established by HUD in this final waiver is as follows:

	Iron and steel - BAP implementation point	Construction materials – Specifically-Listed - BAP implementation point	Construction materials – Not Listed - BAP implementation point	Manufactured products - BAP implementation point
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	As of the date HUD obligates new FFA from Fiscal Year 2024 appropriations	As of the date HUD obligates new FFA from Fiscal Year 2025 appropriations	As of the date HUD obligates new FFA from Fiscal Year 2025 appropriations
Choice Neighborhood, Lead Hazard Reduction, and Healthy Homes Production Grants	New FFA obligated by HUD on or after February 22, 2023	New FFA obligated by HUD on or after August 23, 2024	New FFA obligated by HUD on or after August 23, 2024	New FFA obligated by HUD on or after August 23, 2024
Recovery Housing Program (“RHP”) Grants	New FFA obligated by HUD on or after August 23, 2023	As of the date HUD obligates new FFA from Fiscal Year 2024 appropriations	As of the date HUD obligates new FFA from Fiscal Year 2025 appropriations	As of the date HUD obligates new FFA from Fiscal Year 2025 appropriations
All other HUD FFA except HOME, Housing Trust Fund, and Public Housing FFA used for maintenance projects	New FFA obligated by HUD on or after February 22, 2024	New FFA obligated by HUD on or after August 23, 2024	New FFA obligated by HUD on or after August 23, 2024	New FFA obligated by HUD on or after August 23, 2024
HOME, Housing Trust Fund, and Public Housing FFA used for maintenance projects	New FFA obligated by HUD on or after August 23, 2024	New FFA obligated by HUD on or after August 23, 2024	New FFA obligated by HUD on or after August 23, 2024	New FFA obligated by HUD on or after August 23, 2024

This phased implementation of the BAP advances the goals of 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 HUD FFA used in infrastructure projects. 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 this 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 react to anticipated guidance on how to come into full compliance. This implementation schedule and corresponding waiver allows grantees and funding recipients to focus their efforts in beginning the implementation of the BAP and allows HUD to focus its training and technical assistance on those grantees beginning the implementation process. This waiver is not an alternative to increasing domestic production, but rather serves as 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. The implementation schedule is designed to ensure that domestic manufacturers have sufficient time to become aware of and respond to the market signals from HUD recipients that additional BABA compliant construction materials and manufactured products will be in demand. 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 allows 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 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 grantees. Without this waiver, HUD could 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 could negatively impact the most vulnerable Americans we seek to serve.

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 16 comments were received in response to the proposed waiver and implementation plan. HUD thoroughly reviewed and considered each of the comments in determining to move forward with the issuance of this waiver and implementation plan as published in this Final Notice. Several commenters were supportive of the orderly implementation of the BAP but requested further time and guidance prior to proceeding with such implementation. A few commenters again expressed support for a waiver of broader scope that could potentially exclude all affordable single and multifamily housing programs from the requirements of BABA. Additional commenters requested further delays in the implementation schedule, citing resource constraints and cost uncertainties in support of further delays in implementation. Other commenters expressed concern that the agency is not moving forward with the full implementation of the BAP across all programs immediately.

HUD appreciates the comments from both perspectives, but given the totality of the comments, believes its implementation schedule and corresponding waiver of the application of the BAP as set forth in this Final Notice is appropriate and in the public interest.²

² HUD has and will continue to provide training sessions with grantees to increase grantees' knowledge about Build America, Buy America and the Buy America Preference requirements as they relate to HUD programs and HUD

HUD has expressed its desire to move forward with the full implementation of the BAP across its FFA programs, but believes that the public interest is served best by a measured approach to implementation of the Act, allowing for the 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. HUD therefore declines to alter the proposed phased implementation plan and corresponding waiver at this time, but is taking this opportunity to clarify that the application of the BAP for iron and steel will apply to new awards of FFA in connection with Choice Neighborhood grants and will not retroactively convert ongoing projects to required compliance with the BAP merely because additional supplemental funding awards have been made to facilitate orderly completion of those ongoing projects. 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 further guidance regarding the implementation of the BAP and HUD commits to developing robust guidance regarding the implementation of the BAP across its programs. HUD further recognizes that proposed guidance³ has been issued by the Office of Management and Budget (OMB) concerning the implementation of BABA across FFA programs and will continue to monitor the outcome of the proposed effort to update OMB's guidance in connection with the development of its own guidance for grantees and funding recipients. HUD remains committed to reviewing its plans to provide for the effective and efficient implementation of the Act across its programs and providing timely and appropriate guidance but believes that further extension of its waiver of

FFA used by Non-Federal entities to purchase iron and steel, construction materials, and manufactured products to be used infrastructure projects.

³ [Regulations.gov](https://www.regulations.gov).

application of the BAP beyond the implementation points provided in this Final Notice is not necessary at this time.

VI. 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.

VII. 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.

Marcia L. Fudge,

Secretary.

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