



[Docket No. FR-6407-N-02]

**Public Interest, General Applicability Waiver of Build America, Buy America Provisions as Applied to Pacific Island Territory Recipients of HUD Federal Financial Assistance: Final Notification**

**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), this Final Notice advises that HUD is providing a public interest, general applicability waiver for a period of 15-months to the Buy America Domestic Content Procurement Preference (“Buy America Preference,” or “BAP”) as applied to Federal Financial Assistance (“FFA”) used for infrastructure projects in the Commonwealth of Northern Mariana Islands (“CNMI”), Guam, and American Samoa (hereinafter collectively “Pacific Island Territories”).

**DATES:** Applicable November 15, 2023. This waiver is effective for all FFA obligated by HUD on or after the effective date of this waiver and to the expenditure of funds on or after the effective date of this waiver for any FFA obligated by HUD prior to the effective date of this waiver, through the limited period of 15-months following the effective date of this waiver.

**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](mailto: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 funds newly obligated 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 Generally**

Since the enactment of the Act, HUD has worked diligently to develop a plan to fully implement the BAP across its FFA programs. HUD understands that advancing Made in America objectives is a continuous effort and believes setting forth a transparent schedule of future implementation for FFA programs provides recipients, stakeholders, and industry partners with the time and notice necessary to efficiently and effectively implement the BAP in Pacific Island Territories, which are Commonwealth of Northern Mariana Islands (CNMI), Guam, and American Samoa. Additionally, HUD understands that Pacific Island Territories have significant complications accessing construction materials, manufactured products, and steel needed for infrastructure projects. HUD recently announced plans to move forward with the implementation of the new BAP requirements in connection with its award of FFA to non-Tribal recipients in a

manner designed to maximize coordination and collaboration to support long-term investments in domestic production. HUD continues its efforts to implement the Act in those programs consistent with the guidance and requirements of the Made in America Office of the Office of Management and Budget, including guidance concerning compliance with the BAP.

In order to ensure orderly implementation of the BAP across HUD's FFA 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 in such programs and announced a corresponding implementation plan. As part of those efforts, HUD has published two general applicability, public interest waivers covering Exigent Circumstances and De Minimis and Small Grants, which can be found at

[https://www.hud.gov/program\\_offices/general\\_counsel/build\\_america\\_buy\\_america/waiver](https://www.hud.gov/program_offices/general_counsel/build_america_buy_america/waiver).

Additionally, HUD proposes that it is in the public interest to waive the BABA requirements for FFA awarded for infrastructure projects in Pacific Island Territories while HUD works to gather more information on supply chains, costs, and impacts. This proposed waiver is critical to provide the time for HUD to collect and analyze evidence to determine if a more targeted waiver of these requirements is in the public interest. This waiver would provide the time for the agency to collect and analyze evidence to determine if a more targeted waiver of these requirements is in the public interest. The waiver would also allow time for the agency to offer technical assistance to potential assistance recipients in the remote communities in the Pacific Island Territories. The waiver would also allow time for HUD to offer technical assistance to reduce the administrative burden to recipients for projects in the remote Pacific Island Territories were complying with the domestic sourcing requirements in BABA presents challenges. HUD is concerned that failure to provide these remote infrastructure projects such flexibilities could perpetuate systemic barriers to opportunities and benefits and limit HUD's ability to deliver resources and benefits equitably to all in these Pacific Island Territories. Additionally, HUD may need to dedicate significant staff and contractor time to assist extremely remote Pacific Island Territories with implementing preference

requirements for the first time and to support the increased workload to process project-specific waivers. As such, HUD is interested in determining if these concerns justify a targeted waiver and whether its initial assessment may or may not be borne out by evidence.

### **III. Waivers**

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 section 70914(b) must be published by the agency with a detailed written explanation for the proposed determination and provide an appropriate public comment period of 15 or 30 days depending on the substance of the waiver.

### **IV. Pacific Island Territories Infrastructure and HUD Programs**

Economies in the Pacific Islands are over 5,000 miles from the mainland United States and must import products via air or sea. These economies have few local heavy manufacturers and largely rely on established regional supply chains from east Asia, Australia, and New Zealand. Most goods, equipment materials and supplies are imported and rely on shipping with associated timelines and unpredictable shipping fuel costs fluctuations. Moreover, materials sourced from the United States lead to additional shipping fees and longer lead times, thus significantly extending construction activity schedules. Lastly, ongoing gaps in supply chain availability impact lead times for materials, increasing project timelines. For these reasons, the agency is concerned that complying with the domestic sourcing requirements in BABA may increase already elevated project time and costs—particularly in the short run—and seeks time to better understand the local manufacturing footprint and the balance of equities for residents of the Pacific Island Territories.

HUD is aware that substantial changes to shipping and supply chains to incorporate domestic sourcing requirements for infrastructure projects in Pacific Island Territories could take multiple years to establish. For example, these economies have few local heavy manufacturers and largely rely on established regional supply chains. With the distance of economies in the Pacific Island Territories, these communities must import products via air or sea. Most goods, equipment, materials, and supplies are imported and rely on shipping with associated timelines and unpredictable shipping fuel cost fluctuations. Moreover, materials sourced from the United States may lead to additional shipping fees and longer lead times, thus significantly extending construction activity schedules. For these reasons, HUD is seeking time to better understand the local manufacturing footprint and the balance of equities for residents of the Pacific Island Territories.

For example, HUD Community Planning and Development Formula Program Allocations for Pacific Island Territories include Community Development Block Grant (“CDBG”), HOME, Emergency Solutions Grant (“ESG”), Housing Opportunities for Persons With AIDS Program (“HOPWA”), and Housing Trust Fund (“HTF”). As shown below, there are HUD CDBG formula grant recipients that are subject to the BAP pursuant to HUD’s Public Interest Phased Implementation Waiver<sup>1</sup> of Build America, Buy America Provisions as Applied to Recipients of HUD Federal Financial Assistance, for 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 HOME and HTF, BABA applicability will be in effect for funds obligated by HUD on or after August 23, 2024. For all other HUD FFA including ESG and HOPWA, BABA applicability will be in effect for FFA used to purchase iron and steel used in infrastructure projects for funds obligated by HUD on February 22, 2024. Subsequently, BABA applicability will be in effect for HUD FFA obligated on or after August 23, 2024, for construction materials

<sup>1</sup> See <https://www.hud.gov/sites/dfiles/GC/documents/6331-N-06%20Phased%20Implementation%20Waiver.pdf>.

and manufactured products. Therefore, without a waiver, HUD FFA used in Pacific Island Territories for infrastructure projects will be subject to the BAP.<sup>2</sup>

Additionally, the Public and Indian Housing (“PIH”) Program Allocations for Pacific Island Territories include the Guam Housing & Urban Renewal Authority in Guam and the Northern Marianas Housing Corporation in the CNMI. Pursuant to the phased implementation waiver, BABA applicability will be in effect for funds obligated by HUD on or after August 23, 2024, for public housing FFA used to purchase iron and steel, construction materials, and manufactured products for maintenance projects.

The above-named programs are critical because they allow HUD to support affordable housing and infrastructure needs in these specific Pacific Island Territories – particularly for the benefit of low- and moderate-income families. As of November 15, 2022, the BAP applies to CDBG formula grants used to purchase iron and steel for infrastructure projects. Accordingly, HUD must ensure that Pacific Island Territories Recipients are able to effectively implement the BAP in a manner that ensures that the purposes of BABA are carried out, while at the same time preventing additional undue barriers to the development of Pacific Island Territories infrastructure, which has suffered from decades of underinvestment.

HUD has determined that additional time is needed to fully assess the impacts that the BAP will have on Pacific Island Territories recipients and to plan for the efficient and orderly implementation of the BAP. With the benefit of HUD’s recently published phased implementation waiver and Tribal consultation waiver extension, HUD seeks additional time to seek feedback from Pacific Island Territories, and funding recipients on whether and when HUD should take a similar phased approach with respect to the implementation of the BAP under its Pacific Island Territories programs.

## **V. Public Interest in a General Applicability Waiver of Buy America Provisions for Pacific Island Territories Recipients**

<sup>2</sup> See [https://www.hud.gov/program\\_offices/comm\\_planning/budget](https://www.hud.gov/program_offices/comm_planning/budget)

In this Final Notice, HUD is providing a new and limited, 15-month public interest, general applicability waiver of the BAP in connection with HUD's FFA used for infrastructure in Pacific Island Territories. Infrastructure is an eligible activity under some of the above-named programs and will be subject to the BAP. Because the application of BAP mandated by the Act is new to all HUD FFA for Pacific Island Territories infrastructure projects, HUD needs additional time to engage Pacific Island Territories about the application of the BAP for Pacific Island Territories projects it is imperative to determine how the BAP should be effectively applied to HUD's various FFA for Pacific Island Territories projects, how the BAP should be phased in to allow for successful implementation, and how compliance will be verified – all in a way to enhance infrastructure projects in these areas. As such, there is a significant need for HUD to further engage with Pacific Island Territories recipients. HUD now has the benefit of having fully considered an appropriate method of phased implementation across its other FFA programs and has begun the methodical implementation of the BAP in those other FFA programs. At the same time, HUD has determined that it is in the public's interest to not apply the BAP to FFA awarded for infrastructure projects in Pacific Island Territories prior to additional engagement.

## **VI. Planned Pacific Island Territory Engagement**

Based on HUD's observations it is necessary for HUD to solicit feedback from Pacific Island Territories on issues including how to effectively implement the BAP for extremely remote communities, such as American Samoa. HUD acknowledges that Pacific Island Territories have major concerns about availability of American-made products from the U.S. Mainland and continue to struggle with challenges because of their distance away from main supply sources. Pacific Island Territories are already facing major challenges with accessing construction materials, and major cost overruns due to a lack of available materials – particularly in remote Pacific Island Territories.

During the 15-month waiver period, HUD will thoroughly engage Pacific Island Territories housing practitioners, stakeholders, and FFA recipients. HUD will do so by soliciting feedback from

Pacific Island Territories and stakeholders specifically addressing the impact of the BAP on HUD's Pacific Island Territories programs. After engaging and receiving feedback, HUD will seek to implement the BAP in a manner that advances the Made in America objectives which can also support local supply chains. HUD will implement the BAP in a thoughtful manner that ensures that Pacific Island Territories recipients can effectively implement the BAP without substantially negative impacts on planned and ongoing critical infrastructure projects. HUD will also seek to provide additional technical assistance resources to ensure that Pacific Island Territories recipients can build capacity and be in a better position to comply with the BAP.

### **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 on the cost of foreign-sourced products.

### **VIII. Limited Duration of the Waiver**

The duration of the waiver is 15-months after the effective date of the final waiver. HUD remains committed to the successful implementation of the important BAP across its programs providing covered FFA for infrastructure projects, while recognizing the unique needs and geographically related challenges of Pacific Island Territories. HUD is committed to engaging with Pacific Island Territories, stakeholders, and FFA recipients as noted above to further this goal during this 15-month waiver period. HUD will review this waiver in 12 months to assess whether it remains necessary to the fulfillment of HUD's missions and goals and consistent with applicable legal authorities, such as the IIA, Executive Order 14005, and OMB M-22-11. HUD

may, based on the results of that review, terminate the waiver, or take action to develop a new waiver in consultation with the MIAO.

## **IX. Solicitation of Comments**

HUD solicited comments from the public on its proposed waiver described in a Notice publicly available on its website for a period of 30 days from August 2, 2023 to September 1, 2023, and published in the Federal Register. A total of two 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 and implementation plan as published in this Final Notice. One commenter was supportive of the waiver. One commenter was opposed to the waiver with respect to steel, citing underutilized domestic capacity for the steel industry. The commenter suggested if a steel product were not available from domestic sources, a grant recipient could pursue a product-specific nonavailability waiver for that item. HUD appreciates the comments and did not make any substantive changes to the waiver based on the comments received. The proposed waiver had a duration of 18-months. HUD is issuing the final waiver with a duration of 15-months to better align with the coordinated strategy for the issuance of this waiver type across the Federal Government. HUD believes the 15-month waiver of the application of the BAP as set forth in this Final Notice is appropriate and in the public interest in light of the importance of HUD's planned engagement with Pacific Island Territories and recipients. 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.

**Dated:** November 15, 2023.

**Marcia L. Fudge,**  
*Secretary.*

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