

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

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

Extension of Public Interest, General Applicability Waiver of Build America, Buy America

Provisions as Applied to Tribal Recipients of HUD Federal Financial Assistance:

Final Notice

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](#)), this notice advises that HUD is extending the previously issued public interest, general applicability waiver for an additional period of one year to the Buy America Domestic Content Procurement Preference (“Buy America Preference,” or “BAP”) as applied to Federal Financial Assistance (“FFA”) provided to Tribes, Tribally Designated Housing Entities (“TDHE”s), and other Tribal Entities (hereinafter collectively “Tribal Recipients”).

DATES: Effective May 23, 2023 for HUD Tribal FFA obligated by HUD on or after the effective date of the waiver. In addition, in the case of FFA obligated by HUD in Tribal programs on or after May 14, 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.

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 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 awarding funds to non-Tribal Recipients. HUD understands that advancing Made in America objectives is a continuous effort and believes setting forth a transparent schedule of future implementation in those programs provides industry

partners and non-Tribal Recipients with the time and notice necessary to efficiently and effectively implement the BAP. 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 appropriate compliance with the BAP.

In order to ensure orderly implementation of the BAP across HUD's FFA programs awarding funds to non-Tribal Recipients, 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 for all non-Tribal Recipients. 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/BABA.

Additionally, as noted above, HUD previously published a one-year general applicability, public interest waiver of the BAP in connection with FFA provided to Tribal Recipients¹ effective May 14, 2022 to provide the agency with sufficient time to complete the Tribal

¹ For purposes of this waiver, the term "Tribal Recipients" includes all recipients of grants or loan guarantees administered by HUD's Office of Native American Programs. This includes Indian tribes and TDHEs receiving grants and loan guarantee assistance under the Native American Housing Assistance and Self-Determination Act's (NAHASDA's) Indian Housing Block Grant Program and Title VI Loan Guarantee Program, and Indian tribes and Tribal Organizations receiving Indian Community Development Block Grant funds under the Housing and Community Development Act of 1974. It also includes Federal Financial Assistance provided by HUD to the Department of Hawaiian Home Lands ("DHHL") which receives annual grant funding under the Native Hawaiian Housing Block Grant ("NHHBG") program. HUD will seek feedback from DHHL on BAP implementation and has an interest in ensuring that the NHHBG program aligns with the broader Indian Housing Block Grant program given the similarities amongst the two programs and the fact that they are both authorized under "NAHASDA".

consultation process regarding implementation of the BAP in connection with infrastructure projects. During the pendency of such waiver, HUD actively participated in governmentwide consultation efforts with respect to the applicability of the provisions of the Build America, Buy America Act to Tribal Recipients, generally. Specifically, on September 21, 2022, eight agencies (U.S. Department of the Interior, U.S. Department of Agriculture, U.S. Department of Housing and Urban Development, U.S. Department of Homeland Security, U.S. Department of Energy, U.S. Department of Transportation, U.S. Department of Commerce, and U.S. Small Business Administration) participated in a joint consultation hosted by the White House Council on Native American Affairs to consult with Tribal Nations on discretionary Buy America Preference provisions and the waiver categories characterized in the OMB memorandum. Based on the consultations held, Tribes were requested to provide written comments and feedback by October 20, 2022 for Federal agency consideration. The resulting comments were received by the White House Council and distributed to agencies on October 25, 2022.

HUD is now moving forward with consultation on specific plans for implementation of the BAP in HUD's FFA provided to Tribal Recipients, in light of the comments received from the Tribal leaders and the progress the agency has made implementing the BAP in other FFA programs. In order to appropriately engage in consultation as described in HUD's Tribal Government-to-Government Consultation Policy,² consistent with President Biden's "Tribal Consultation and Strengthening Nation-to-Nation Relationships" Memorandum regarding the appropriate application of BAP to such entities, HUD needs an additional period of time in which to further consult on the more specific application of the BAP to HUD's Tribal Recipients.

² https://www.hud.gov/program_offices/public_indian_housing/ih/regs/govtogo_tcp. See also 81 FR 40893.

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 section 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. Pursuant to section 70914(d)(2), when seeking to extend a waiver of general applicability, HUD is required to provide for a public comment period of not less than 30 days on the continued need for such waiver.

On May 14, 2022, HUD published a General Applicability Waiver of Build America, Buy America Provisions as Applied to Tribal Recipients of HUD Federal Financial Assistance for a period of one year. The current waiver expires on May 14, 2023. During this time period, HUD participated in an interagency Tribal Consultation on the implementation of BABA and participated in an interagency workgroup to address issues raised during the joint consultation.

IV. Tribal Infrastructure and HUD Programs

Many Tribal communities still lack basic infrastructure such as roads, running water, and indoor plumbing. The need for safe, decent, and sanitary housing is immense. In its [2017 Housing Needs Study](#), HUD concluded that 68,000 new units were needed in Indian Country to replace inadequate units and eliminate severe overcrowding. That same study found that the lack of infrastructure was the number one barrier to housing development in many Tribal communities. Not only is infrastructure in many Tribal communities in dire need of repair and

modernization, but Tribes also often find it difficult to locate available supplies, suppliers, and construction labor necessary to develop that infrastructure.

The COVID-19 pandemic compounded the infrastructure challenges faced by many Native American communities. Recent feedback from Tribal Recipients has disclosed the numerous challenges they experienced while implementing the various HUD COVID-19 relief programs. A lack of supplies and a lack of available contractors working in Tribal communities were identified as the primary challenges faced by Tribal Recipients. Tribal Recipients indicated to HUD that procuring supplies and materials can be very difficult at times, and this made HUD-funded infrastructure projects challenging to implement to completion and at budgeted cost. Even when supplies were available for purchase, increased costs for steel, lumber, and transportation combined with lack of developers to bid on projects led to a backlog of construction projects and severely impacted Tribes' ability to complete important infrastructure projects and construct new housing.

Unfortunately, many Tribes are more disconnected from American supply chains than the average HUD grantee due to their remoteness. For example, some Alaska Native villages are not on the road system, must develop infrastructure and housing during an extremely short construction season, and must grapple with unique transportation limitations, including having to ship basic construction materials only twice per year by barge at extremely elevated costs. These Tribes often report to HUD that it can be a major challenge to secure space on a barge for construction materials. At times, even when space is secured, any unexpected setbacks faced, such as loss of cargo, materials damaged through shipping, or miscalculation of the appropriate amount or quality of materials needed, can result in infrastructure and housing projects being

delayed an entire construction season. These Tribes end up waiting for the next barge in six months and face cost overruns.

Annually, HUD provides over \$1 billion in FFA to almost 600 sovereign Tribal Nations. Programs like the Indian Housing Block Grant (“IHBG”) and the Indian Community Development Block Grant (“ICDBG”) program are critical programs that allow the Federal Government to carry out its trust responsibilities and support affordable housing and infrastructure development in Tribal communities. Under these programs, HUD provides block grant funding to Tribal Recipients to help address these housing and infrastructure needs – particularly for the benefit of low- and moderate- income families. HUD anticipates that the BAP will apply to some projects funded under these programs. Accordingly, HUD must ensure that Tribal 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 Tribal infrastructure, which has suffered from decades of underinvestment.

HUD has determined that the prior one-year waiver period was insufficient to fully consult and assess the impacts that BAP will have on HUD’s Tribal Recipients. While the interagency consultation webinar provided HUD with some additional insight into how the BAP will impact Tribal communities generally, HUD is particularly interested in seeking more tailored Tribal feedback on the impact of the BAP on infrastructure projects that are funded under HUD’s various Tribal programs. Additionally, since the interagency webinar was held in 2022, HUD has determined to implement the BAP in a phased manner across its non-Tribal programs. With the benefit of this recent determination, HUD needs additional time to seek Tribal feedback on whether and when HUD should take a similar phased approach with respect to the implementation of the BAP under its Tribal programs. HUD will also assess the unique

and diverse conditions of Tribal communities across Indian Country and determine how the BAP should be applied after taking those conditions into account. Additional time is needed to consult with Tribal Leaders.

V. Public Interest in a General Applicability Waiver of Buy America Provisions for Tribes, TDHEs, and Other Tribal Entities (“Tribal Recipients”)

HUD sought public comment on a limited, one-year extension of HUD’s existing public interest, general applicability waiver of the BAP in connection with HUD’s FFA to Tribal Recipients to provide the Department with sufficient time to complete consultation consistent with HUD’s Tribal Government-to-Government Consultation Policy. HUD’s ‘Tribal Government-to-Government Consultation Policy’ 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 FFA directed to Tribal communities.

In fiscal year 2023, Tribal Entities received over \$1 billion through the Department’s programs. Infrastructure is an eligible activity under some of these programs and could 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 all HUD Tribal FFA recipients, HUD has not had the benefit of engaging in fulsome consultation consistent with its Tribal Consultation policy concerning the application of the BAP to Tribal Recipients – particularly with respect to how the BAP should apply to HUD’s various Tribal programs, how the BAP should be phased in to allow for

successful implementation, and how compliance will be verified. While HUD participated in a general consultation session as part of a governmentwide interagency process regarding the general application of the BAP to Tribal Recipients, 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 further engage in Tribal consultation on the specific intended application of the BAP to FFA awarded to HUD's Tribal 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. With the benefit of this experience and the benefit of the governmentwide consultation efforts, HUD will conduct a more tailored consultation process with the Tribal Recipients of HUD FFA specifically focused on the BAP application to HUD's various Tribal housing and community development programs. HUD believes that the Tribal consultation process is necessary for the successful implementation of the BAP across its covered FFA programs funding infrastructure projects, 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. Accordingly, HUD has determined that it would be contrary to the public's interest to apply the BAP to FFA awards to Tribal Recipients prior to completion of further Tribal consultation. In addition, HUD published the proposed waiver in the Federal Register with an extension of the comment period to May 8, 2023.

VI. Planned Tribal Consultation

Similar to other HUD programs, HUD will seek Tribal feedback consistent with HUD's Tribal Government-to-Government Consultation Policy and Executive Order 13175 on when and

how to phase in the BAP for FFA provided to Tribal Recipients. HUD will also solicit Tribal feedback on other related issues, including how to effectively implement the BAP for extremely remote communities, such as remote Native Alaskan Villages, that are more disconnected from traditional supply chains, have an extremely short construction seasons, are located off the road system, and are reliant on barges to ship construction materials. HUD acknowledges that rural Tribal communities and Alaska Native Villages have expressed major concerns about availability of American-made products and continue to struggle with challenges because of their proximity away from main supply sources. Tribes are already facing major challenges with accessing construction materials, and major cost overruns due to a lack of available materials – particularly in remote Tribal communities.

During the one-year waiver period, HUD has identified various scheduled national and regional convenings and conferences where HUD intends to host in-person Tribal consultation sessions with Tribal leaders to discuss the BAP. Currently, HUD is scheduled to present during the Forum on Affordable Housing and Community Development Annual Conference. Additionally, HUD will seek to engage with Tribes and Tribal housing practitioners at the various quarterly and semi-annual regional housing association meetings that are planned during the one-year waiver period. These association meetings are routinely attended by HUD Tribal Recipients who will be charged with complying with the BAP once it goes into effect. Consistent with past practice, HUD also intends to conduct some Tribal consultation virtually. HUD will do so by soliciting written feedback from Tribal leaders specifically addressing the impact of the BAP on HUD's Tribal programs.

After receiving Tribal feedback, HUD will seek to implement the BAP in a manner that advances the Made in America objectives while also ensuring that the BAP implementation does

not serve as a major barrier to Tribal communities' efforts to develop critical infrastructure. Many Tribal communities lack running water, sewer, roads, and basic infrastructure. HUD will implement the BAP in a thoughtful manner that ensures that Tribal Recipients can effectively implement the BAP without substantial negative impacts on planned and ongoing critical infrastructure projects. HUD will also seek to provide additional technical assistance resources to ensure that Tribal Recipients can build capacity and be in a better position to comply with the BAP. Therefore, HUD is extending for a period of one year the waiver of its general applicability, public interest waiver of the application of the BAP in connection with FFA awards to Tribal Recipients that are obligated by HUD during the pendency of the waiver.

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.

VIII. Limited Duration of the 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 government-to-government relationship it has with Tribal Recipients receiving HUD FFA for infrastructure projects. HUD is committed to engaging in a timely consultation process as noted above to further this goal.


IX. Solicitation of Comments

As required under section 70914 of the Act, HUD solicited comment from the public on the waiver announced in a Notice on its website for a period of 30 days and published the proposed waiver in the Federal Register. A total of three comments were received in response to the proposed one-year waiver extension. 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. Two of the commenters were very supportive of the one-year waiver extension. One of the commenters opposed the one-year extension waiver with respect to steel, in particular. HUD appreciates the comments and believes the one-year waiver extension 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 tribal consultation.³ 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.

This Final Notice is applicable to Tribal FFA obligated by HUD on or after the effective date of this Final Notice throughout the one-year waiver period. This Final Notice is also applicable to any expenditures of Tribal FFA obligated by HUD between May 14, 2023 and the effective date of this Final Notice that occur on or after the effective date of this Final Notice.

³ 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 FFA used by Non-Federal entities to purchase iron and steel, construction materials, and manufactured products to be used infrastructure projects.

Dated: 5/23/2023



Marcia L. Fudge
Secretary

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