

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Docket No. FR-6331-N-05

**Public Interest Exigent Circumstances Waiver of Build America, Buy America Provisions
as Applied to Certain 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 departmentwide public interest waiver to the Buy America Domestic Content Procurement Preference (“Buy America Preference,” or “BAP”) for grantees and recipients of Federal Financial Assistance from HUD as applied to the iron, steel, manufactured products, and construction materials requirement of BABA in certain exigent circumstances. In accordance with the Act, HUD has found that this proposed departmentwide exigent circumstances waiver is 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: HUD published this proposed waiver on its website on October 31, 2022. Comments on the proposed waiver set out in this document are due on or before November 15, 2022.

ADDRESSES: Interested persons are invited to submit comments on this proposed 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).

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 Federal Financial Assistance from a program for infrastructure, and any of those funds obligated by the grantee, are covered under the BABA provisions of the Act, 41 U.S.C. 8301 note, unless covered by a waiver. Section 70912(4)(B) of

the Act specifically exempts from the term Federal Financial Assistance certain assistance authorized under certain sections of the Robert T. Stafford Disaster Relief and Emergency Assistance Act or *pre and post disaster or emergency response expenditures*.

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 Federal Financial Assistance programs for compliance with the BAP on January 19, 2022, by 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 provided to Tribal recipients for a period of one year. Additionally, HUD published a Request for Information "Request for Information Relating to the Implementation of the Build America, Buy America Act" to gather additional information necessary to fully implement the BAP for HUD programs and to adequately prepare necessary Paperwork Reduction Act notices relating to such implementation. (June 1, 2022, 87 FR 33193)

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 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 in this General Applicability Waiver of Buy America Provisions

HUD is proposing 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 in order to promote investment in HUD's domestic manufacturing base, strengthen critical supply chains, and position United States workers and businesses to compete globally in the 21st century. 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.

HUD recognizes that there are exigent circumstances, particularly with respect to the conduct of maintenance and other rehabilitation and repair activities in connection with affordable housing and community development projects, that warrant the exclusion from the application of the BAP in the public interest. Specifically, where an award for Federal Financial

Assistance is being utilized to repair or conduct maintenance of infrastructure within the meaning of the Act in exigent circumstances, the ability to quickly respond and address the need is critical to ensuring the protection of life, safety and property of residents and community members. This ability to immediately respond to such situations could be compromised if the grantee or recipient is required to navigate the complex BAP requirements for such an activity in the midst of the exigent circumstances.¹ Such a waiver will allow HUD grantees and funding recipients to focus their efforts on such critical projects. Proposing the waiver is not an alternative to increasing domestic production. It is actually a tool to promote investment in our domestic manufacturing base in the long term. The waiver is in the interest of efficiency, to ease burdens for grantees and recipients, avoid unnecessary costs, and avoid delays to projects that are critical and time sensitive. The 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 HUD's economic and national security. This waiver will also allow recipients to continue with projects. 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

¹ Please note that section 70912(4)(B) of the Act excludes “pre and post disaster or emergency response expenditures from inclusion within the definition of Federal Financial Assistance subject to the BAP. 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) confirms that pre and post disaster or emergency response expenditures” includes those expenditures “that are (1) authorized by statutes other than the Stafford Act, 42 U.S.C. 5121 et seq., and (2) made in anticipation of or response to an event or events that qualify as an “emergency” or “major disaster” within the meaning of the Stafford Act, *id.* section 5122(1), (2).” As a result, HUD’s provision of Federal Financial Assistance through specific emergency and disaster recovery grants, (e.g., CDBG-DR grants), which are appropriated by Congress in response to an emergency or disaster within the meaning of the Stafford Act are statutorily excluded from the applicability of BAP.

protect life, safety and property, and will negatively impact the most vulnerable Americans HUD seeks to serve.

For example, if a public housing development is damaged by a boiler malfunction in the middle of the winter, the need to repair the damaged structure and replace the boiler is of immediate concern in protecting the life, safety, and property of the residents of that public housing development. Additionally, for example, if an emergency or fire exit door is damaged and becomes unusable, the need to repair the exit door is of immediate concern to protecting the life, safety and property of the residents of that public housing development. Included within the scope of exigent circumstances are the remediation of defects impacting housing quality standards that existing HUD policy requires to be completed within 30 days or less. The potential consequences and impact of incidents meeting these standards can endanger the life, safety or property of residents and the community, and necessitate urgent action to remediate the issue. Thus, for purposes of this waiver, HUD will consider exigent circumstances to include circumstances where undertaking the BAP covered activity without delay is necessary to protect life, safety or provide necessary security to residents or community members, or to prevent the destruction of property. The waiver of BAP will apply provided such remediation is carried out within the time period required by HUD policy.

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. HUD does not currently track funds used on infrastructure projects for an exigent circumstance, but estimates that in an average year, less than 1 percent of annual CDBG funds are used for urgent needs activities.

HUD believes that full compliance with the BAP in exigent circumstances will create undue hardship due to the anticipated burdensome delays to ensure compliance with the BAP and, as noted, could jeopardize the life, health and safety of residents and community members unnecessarily for funds being utilized in exigent circumstances. As a result, HUD has determined that it is not in the public interest to impose the BAP on projects completing covered infrastructure activities in exigent circumstances.

HUD expects to review this waiver every five years from the effective date of this waiver or more often as appropriate. Funds obligated by HUD during the time period this waiver is effective will not be required to apply the BAP when funds are expended by the grantee or funding recipient in connection with exigent circumstances as described in this waiver.

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 Federal Financial Assistance.

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.² 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.

VII. Solicitation of Comments on the Waiver

As required under section 70914 of the Act, HUD is soliciting comment from the public on the public interest waiver announced in this Notice. In particular, HUD invites comments on the definition of exigent circumstances that serves as the foundation for the application of the waiver, including the types of activities undertaken in response to such circumstances that should be considered within the scope of this waiver. HUD also invites comments on the process through which grantees or funding recipients may demonstrate or document reliance on this waiver.

Dated: _____



Marcia L. Fudge
Secretary

[Billing Code 4210-67]

² 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>.