

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Docket No. FR-6331-N-05

Public Interest Waiver of Build America, Buy America Provisions for Exigent Circumstances 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: Final Notice.

SUMMARY: In accordance with the Build America, Buy America Act (“BABA” or “the Act”) this notice advises that HUD is issuing 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 (“FFA”) 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 departmentwide waiver for exigent circumstances 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: As required under section 70914 of the Act, HUD published this proposed waiver on its website on October 31, 2022, for public comment. In addition, HUD published the proposed waiver in the Federal Register. Comments on the proposed waiver set out in this document were

due on or before November 15, 2022. Through this Final Notice, HUD is announcing that it has issued this waiver effective November 23, 2022. This waiver will remain effective for a period of five years or such shorter time period as HUD may announce via Notice.

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 FFA 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 FFA 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. HUD published a Notice proposing the waiver that is being finalized through this notice on its website on October 31, 2022, and via the

Federal Register. 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 issuing 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. 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 FFA 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. Issuing this waiver is not an alternative to increasing domestic production. 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, delays may occur to critical activities to protect life, safety, and property, which may 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

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.

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 infrastructure project 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. Consideration of 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 11 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 as published in this Final Notice. The comments generally favored an exigent circumstances waiver as proposed.

A few commenters expressed support for a broader waiver and greater deference to the determinations of grantees in terms of projects that fall within the scope of exigent circumstances. Several proponents of the waiver requested that HUD provide greater clarity regarding the implementation of the BAP and the appropriate application of this waiver. HUD appreciates these comments and will continue to work to develop robust guidance regarding the implementation of the BAP across its programs. HUD remains committed to reviewing the waivers it issues every five years or more often if necessary and appropriate.

A few comments were received from manufacturers and trade organizations that opposed portions of the proposed waiver because they would prefer a more narrowly tailored waiver, if a waiver is issued at all. Several of these comments expressed concern that the waiver would give rise to a loophole to avoid compliance with the BAP. HUD appreciates the comments but believes that the waiver is sufficiently narrowly tailored to specific actions necessary to protect life, safety and property from imminent threats that the risk of abuse is outweighed by the need to provide flexibility to act swiftly in exigent circumstances.

HUD expects the future guidance and technical assistance it provides to grantees regarding the implementation of the Act to address any concerns that the scope or applicability of this waiver will be misconstrued by grantees. HUD will not allow the use of the waiver in any artificial or contrived circumstances designed to avoid the proper application of the BAP requirements. HUD has therefore declined to modify the waiver at this time, but will continue to monitor the usage of the waiver so it may swiftly address any future confusion over the proper application of the waiver. The complexities of applying the BAP in exigent circumstances where there is a risk posed to life, safety, or property are such that HUD maintains, for the reasons outlined herein, the public interest necessitates this waiver of the BAP.

HUD will continue its work to assess compliance alternatives and options best suited to enable grantees and funding recipients to swiftly address projects necessitated by exigent circumstances and will reevaluate this waiver in five years or sooner as appropriate. Additionally, HUD will continue to assess the need for and provide additional guidance for funding recipients and grantees to ensure the appropriate implementation of the BAP in its programs. At this time, HUD is issuing, without substantive change other than minor, inconsequential grammatical revisions, this Exigent Circumstances Waiver via this Final Notice.

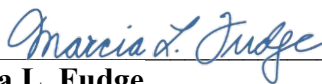
VI. Impact of this Waiver on other Federal Financial Assistance

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.

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.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.

Dated: 11/23/2022



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>.