

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Docket No. FR-6331-N-08

Public Interest *De Minimis*, Small Grants, and Minor Components 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 *de minimis*, Small Grants, and Minor Components waiver to the Buy America Domestic Content Procurement Preference (“Buy America Preference,” or “BAP”) as applied to the iron, steel, manufactured products, and construction materials requirement of the Act for recipients of Federal Financial Assistance. For the purposes of this proposed waiver, HUD is proposing to waive the application of the BAP for infrastructure projects whose total cost is an amount equal to or less than the Simplified acquisition threshold, which is currently \$250,000. HUD is also proposing to waive the application of the BAP for all Small Grants of Federal Financial Assistance that are equal to or below the Simplified acquisition threshold, which is currently \$250,000. Additionally, HUD is proposing to waive the application of the BAP for Minor Components of an infrastructure project, such that a cumulative total of no more than a total of 5 percent of the total cost of the iron, steel, manufactured products, and construction materials used in and incorporated into the infrastructure project, up to a maximum of \$1 million.

In accordance with the Act, HUD has found that such proposed De Minimis, Small Grants and Minor Components waivers are 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 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. 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, through 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 completing the Covered Activities 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

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 whether it is in the public interest to waive application of a BAP to awards below the Simplified Acquisition Threshold. 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 and lead 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.

Through this notice, HUD is proposing to waive the application of the BAP for infrastructure projects whose total cost is an amount equal to or less than the 2 CFR 200.1 *Simplified acquisition threshold*, which is currently \$250,000. HUD is also proposing to waive the application of the BAP for all Small Grants of Federal Financial Assistance that are equal to or below the 2 CFR 200.1 *Simplified acquisition threshold*, which is currently \$250,000. HUD is also proposing to waive the application of the BAP for Minor Components of an infrastructure project, such that a cumulative total of no more than a total of 5 percent of the total cost of the iron, steel, manufactured products, and construction materials used in and incorporated into the infrastructure project, up to a maximum of \$1 million.

For purposes of the Act, an infrastructure project involves the undertaking of any "construction, alteration, maintenance, or repair" of "infrastructure," which includes, among other things, the "structures, facilities and equipment" of "buildings and real property."

In accordance with the Act, HUD has found that such proposed De Minimis, Small Grants and Minor Components waivers are in the public interest. Such waivers will allow HUD, grantees and funding recipients to focus their efforts on such critical projects. Proposing the waivers is not an alternative to increasing domestic production. It is actually a tool to promote investment in HUD's domestic manufacturing base in the long term. The waivers are in the interest of efficiency, to ease burdens for HUD grantees and funding recipients, 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 our economic and national security. These waivers will allow HUD grantees and funding recipients to continue with projects. Without these waivers, 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 protect life, safety and property, and will negatively impact the most vulnerable Americans HUD seeks to serve.

For purposes of this waiver, HUD will evaluate the total cost of the infrastructure project as it would for purposes of the review contemplated under 24 CFR Part 58, i.e., by defining the scope consistent with 24 CFR 58.2(a)(4), as “the activity, or a group of integrally related activities, designed by the recipient to accomplish, in whole or in part, a specific objective.” HUD believes its grantees and recipients of Federal Financial Assistance that will be used for Covered Activities are familiar with this regulation and understand the proper application of the concept in connection with their activities, or as otherwise defined by HUD in a notice. However, in connection with the public housing program, evaluation of certain maintenance and repair activities within the definition of infrastructure projects under the Act is not appropriate using this standard. Therefore, for the purposes of determining the applicability of this waiver in connection with the maintenance and repair of public housing, HUD will evaluate the infrastructure project as including the single relevant procurement contract for such maintenance or repairs, or, where applicable, the collection of procurements focused on the same specific objective (e.g., construction of a resident service space) or limited scope of work (e.g., lead based paint abatement).

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.

As HUD's previous Notice 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 Federal Financial Assistance, this waiver advances BABA by reducing the administrative burden to potential assistance recipients where the costs of 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. Moreover, HUD does not believe the waiver of the BAP for such awards will undermine the full and robust implementation of the Act or the ability of the agency to support the purposes behind the Act.

HUD expects to review this waiver every five years from the effective date of this waiver or more often as appropriate. No funds obligated by HUD or the grantee/funding recipient during the period of the waiver that would be exempted from compliance with BAP as a result of the waiver will be required to apply the BAP.

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.¹ 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.

VI. Solicitation of Comments on the Waiver

¹ 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>.

As required under section 70914 of the Act, HUD is soliciting comment from the public on the waiver announced in this Notice. In particular, HUD invites comments on whether the reliance on the Simplified acquisition threshold is an appropriate measure and if it is set at an appropriate level for purposes of the waiver. Additionally, HUD seeks comments on the percentage of costs excluded from coverage and whether there should be a cap on the total amount excluded from coverage. For example, should the total costs allowed to be excluded be limited only by the 5% exclusion, is the cap of \$1 million appropriate or should it be capped at some other threshold?

Dated: _____



Marcia L. Fudge
Secretary

[Billing Code 4210-67]