

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-6407-N-01]

Public Interest, General Applicability Waiver of Build America, Buy America Provisions as Applied to Pacific Island/Territory 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), this notice advises that HUD is proposing a public interest, general applicability waiver for a period of 18 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, American Samoa, (hereinafter collectively “Pacific Island/Territory Communities”). In the case of FFA obligated by HUD through its Community Development Block Grant (CDBG) programs on or after November 15, 2022, but prior to the effective date of the final waiver, the waiver applies to all expenditures incurred on or after the effective date of the final waiver up until the limited period of 18 months. For expenditures incurred on or after the effective date of the final waiver, the waiver applies both to funds obligated by HUD on or after the effective date of the final waiver and any expenditures up and until 18 months from the effective date of the final waiver.

DATES: HUD published this proposed waiver for public comment on its website on August 2, 2023. Pursuant to Section 70914(c)(2) of BABA, HUD is required to solicit comments from the public on this proposed waiver. As a matter of policy, HUD has elected to provide the public with an opportunity to comment for an extended period of thirty days from the date published on HUD’s webpage in this instance. Comments on the proposed waiver set out in this document are

due on or before September 1, 2023. HUD will consider comments received in response to this Notice and announce its determination with respect to the adoption of this notice, including any changes that may be made in response to comments through a subsequent Notice.

ADDRESSES: Interested persons are invited to submit comments on the 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.

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). 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>. Copies of all submissions are available for inspection and downloading at www.regulations.gov.

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. 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/Territory Communities.¹ Additionally, HUD understands that similar to Tribal FFA Recipients, Pacific Island/Territory Communities 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.

¹ Pursuant to 42 USC 5302(a)(24) (24), the term “insular area” means each of Guam, the Northern Mariana Islands, the Virgin Islands, and American Samoa. As proposed, this waiver would only be applicable for CNMI, Guam, American Samoa, if made final.

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. 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, HUD proposes that it is in the public interest to waive the BABA requirements for FFA awarded for infrastructure projects in Pacific Island /Territory Communities 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 the BAP requirements is in the public interest. 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 /Territory Communities were complying with the domestic sourcing requirements in BABA presents challenges. HUD is concerned that failure to provide these remote communities with 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 /Territory Communities. Additionally, HUD may need to dedicate significant staff and contractor time to assist extremely remote Pacific Island /Territory Communities 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/Territory Infrastructure and HUD Programs

Many Pacific Island/Territory Communities still lack basic infrastructure such as roads, running water, and indoor plumbing. The need for safe, decent, and sanitary housing is immense. For example, the Northern Marianas are very far away from the U.S. Mainland. This will create challenges with HUD providing technical assistance and monitoring the use of the funds. It is also a place with very different rules than the U.S. Mainland and is much more connected to Asia than to the U.S. Mainland. Standard products that are absolute necessities in the Pacific Island/Territory Communities, like typhoon-rated glass windows and aluminum shutters, also cost significantly more if sourced domestically. For example, representatives of Pacific Island/Territory communities stated, “the cost of aluminum is double if sourced from the U.S. Mainland” and “The shipping cost from Korea or Asia for a 20-footer container is \$3,000 but shipping from the mainland United States is about \$12,000.”

HUD is aware that substantial changes to shipping and supply chains to incorporate domestic sourcing requirements for infrastructure projects in Pacific Island/Territory Communities could take multiple years to establish. For example, these economies have few local heavy manufacturers and largely rely on established regional supply chains from the Philippines. With the distance of economies in the Pacific Island/Territory Communities, 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 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, HUD is concerned that requiring compliance with the domestic sourcing requirements in BABA at this time may increase already elevated project completion times 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/Territory Communities.

For example, HUD Community Planning and Development Formula Program Allocations for Pacific Island/Territory Communities include Community Development Block Grant, 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](#) 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 and manufactured products. Therefore, without a waiver, HUD FFA used in Pacific Island/Territory Communities for infrastructure projects will be subject to the BAP.²

FY 2023 Community Planning and Development Formula Program Allocations						
NAME	STA	CDBG	HOME	ESG	HOPWA	HTF
American Samoa	AS	\$1,029,433	\$298,791	\$85,296	\$0	\$0
Guam	GU	\$3,185,755	\$1,256,171	\$263,963	\$0	\$157,106.91
Northern Mariana Islands	MP	\$980,125	\$489,268	\$81,210	\$0	\$76,533.43

FY 2023 Public and Indian Housing Program Allocations				
NAME	STA	Operating Fund	Capital Funds	Section 8
Guam	GU	\$5.33 million	\$3.2 million	\$38.3 million
Northern Mariana Islands	MP	\$0	\$0	\$3.3 million

Additionally, the Public and Indian Housing (“PIH”) Program Allocations for Pacific Island/Territory Communities include the Guam Housing & Urban Renewal Authority in Guam and the Northern Marianas Housing Corporation in the Northern Marianas islands. Pursuant to

² See https://www.hud.gov/program_offices/comm_planning/budget

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/Territory Communities – 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/Territory 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/Territory 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/Territory Recipients and to plan for the efficient and orderly implementation of the BAP, as appropriate. HUD is particularly interested in developing a specifically tailored waiver based on stakeholder and Pacific Island/Territory Recipient feedback regarding the impact of the BAP on infrastructure projects that are funded under HUD's various Pacific Island/Territory programs. With the benefit of HUD's recently published phased implementation waiver and Tribal consultation waiver extension, HUD needs additional time to seek feedback from Pacific Island/Territory Communities 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/Territory programs. HUD will also assess the unique and diverse conditions of Pacific Island/Territory Communities across the country and determine how the BAP should be applied after taking those conditions into account.

V. Public Interest in a General Applicability Waiver of Buy America Provisions for Pacific Island/Territory Recipients

In this Notice, HUD is seeking comment on a new limited, 18-month public interest, general applicability waiver of the BAP in connection with HUD's FFA used for infrastructure in Pacific Island/Territory Communities to provide the Department with sufficient information to successfully implement BABA. 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/Territory infrastructure projects, HUD needs additional time to engage Pacific Island/Territory Communities about the application of the BAP for Pacific Island/Territory projects – particularly with the distance from economies, it is imperative to determine how the BAP should be effectively applied to HUD's various FFA for Pacific Island/Territory 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/Territory 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/Territory Communities prior to additional engagement.

VI. Planned Pacific Island/Territory Engagement

Based on HUD's observations about disaster recovery for three 2018 disasters in the Pacific - American Samoa's recovery from Cyclone Gita and the most severe disaster – Typhoon's Mangkhut and Super Typhoon Yutu in the Northern Marianas, it is necessary for HUD to solicit

feedback from Pacific Island/Territory Communities on other related issues, including how to effectively implement the BAP for extremely remote communities, such as the American Samoa. For example, the Northern Marianas is comprised of fifteen islands, three of them that are populated. Of the three, the most populated is Saipan (population 48,220), the nearby Tinian (3,136), and Rota (2,527), which is closer to Guam than it is to Saipan. Much different than American Samoa, the Northern Marianas are connected to Asia – two to four hours of flying to get to Asia is closer than anywhere on the U.S. Mainland except Guam. HUD acknowledges that Pacific Island/Territory Communities 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/Territory Communities 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/Territory Communities.

During the 18-month waiver period, HUD will thoroughly engage Pacific Island/Territory housing practitioners, stakeholders, and FFA recipients. HUD will do so by soliciting written feedback from Pacific Island/Territory Communities and stakeholders specifically addressing the impact of the BAP on HUD's Pacific Island/Territory programs. After engaging and receiving 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 Pacific Island/Territory Communities' efforts to develop critical infrastructure. HUD will implement the BAP in a thoughtful manner that ensures that Pacific Island/Territory 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 Pacific Island/Territory 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

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/Territory Communities. HUD is committed to engaging with Island/Territory Communities, stakeholders, and FFA recipients as noted above to further this goal.

IX. Solicitation of Comments

HUD is soliciting comment from the public on the proposed waiver described in this Notice for a period of 30 days from the date of publication on HUD's webpage. If issued, this waiver will be applicable to Pacific Island/Territory FFA that HUD obligates on or after the effective date of the final waiver and in connection with the expenditure of FFA, which had been previously obligated by HUD, throughout the applicable waiver period.

Dated: 8/2/2023



Marcia L. Fudge
Secretary

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