



We help build homes and communities across rural America.

July 15, 2022

Submitted via regulations.gov

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street, SW
Room 10276
Washington, DC 20410-0500

Re: Implementation of the Build America, Buy America Act
Docket HUD-2022-0033

Gentlepersons:

The Housing Assistance Council (HAC) appreciates this opportunity to comment on implementation of the Buy America preference (BAP) in the Build America, Buy America (BABA) Act by the Department of Housing and Urban Development (HUD).

HAC is a national nonprofit organization that helps build homes and communities across rural America. Since 1971, HAC has provided below-market financing for affordable housing and community development, technical assistance and training, research and information, and policy formulation to enable solutions for rural communities across the country. In our work, HAC places a special focus on high-needs rural regions – including the Mississippi Delta and the Black Belt, rural Appalachia, Indian Country, the border colonias, and farmworker communities.

HAC is a grantee under HUD's Self-Help Homeownership Opportunity Program (SHOP) and, through HUD's Rural Capacity Building (RCB) program, provides technical assistance on the use of other HUD funding sources such as the HOME Investment Partnerships (HOME) and Community Development Block Grant (CDBG) programs.

With over 50 years of experience supporting and developing affordable housing and using HUD financial assistance across rural America, HAC is uniquely positioned to comment on BABA's potential impacts for affordable rural housing.

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HAC is an equal opportunity provider, employer, and lender.

HUD has posed 12 questions; HAC is providing feedback on three of these questions.

1. What HUD Federal Financial Assistance is used to fund infrastructure as defined under the Build America, Buy America Act? ...

2. How can HUD document what projects serve a “public function,” thus qualifying as infrastructure under OMB’s guidance and falling within the scope of the Act? ... Agencies are advised to consider whether the project will serve a public function, including whether the project is publicly owned and operated, privately operated on behalf of the public, or is a place of public accommodation, as opposed to a project that is privately owned and not open to the public. Projects with the former qualities have greater indicia of infrastructure, while projects with the latter quality have fewer. ...

HUD should exempt or waive BABA preferences when HUD assistance is used for owner-occupied housing.

BABA’s definition of infrastructure includes “buildings and real property” (§70912). As HUD’s questions note, the Office of Management and Budget’s April 18, 2022 [guidance](#) for federal agencies makes clear that BABA applies specifically to “public” infrastructure and states that a project “consisting solely of the purchase, construction, or improvement of a private home for personal use, for example, would not constitute an infrastructure project.”

HUD should exempt or waive BABA preferences when HUD assistance is used for rental housing.

It could be argued that none of HUD’s funding is used for BABA-defined infrastructure. “Buildings and real property” appears at the end of a list of items that are all, without exception, for the benefit of the general public: roads, freight facilities, utilities, broadband infrastructure, and the like. One could reasonably conclude, therefore, that the only “buildings and real property” covered by the Act are those that benefit the entire public and that assisted housing is not included because it is available to only a subset of the general population, those living in the private property.

The U.S. Department of Agriculture, which administers programs for both owner-occupied and rental housing, seems to have decided that housing does not fall under BABA’s definition of infrastructure. It did not include any of its housing programs on its [initial list](#) of programs subject to the Buy America preference.



HUD should exempt or waive BABA preferences when HUD assistance is used for infrastructure that is built solely to support affordable housing.

Some HUD assistance, including SHOP funding, can be used for traditional public works infrastructure. SHOP-financed infrastructure is exclusively constructed to support the development of affordable owner-occupied housing. This is typically private infrastructure, but in certain cases it may eventually become public. For instance, SHOP funds can be used for roads in a subdivision. Those roads are private when developed and remain so while the subdivision is under development. At the end of the subdivision build-out, those roads sometimes remain privately owned and administered and sometimes they are conveyed to the municipality. In that instance, it would be difficult to determine if the HUD-funded infrastructure is public (and covered by BAP) or private (and not covered by BAP). Regardless, any infrastructure project should be exempt when it is provided solely to help make homeownership affordable for low-income families.

HUD should exempt or waive BABA preferences when a housing project receives less than \$250,000 in federal funding or has fewer than eight units.

In its [guidance](#), the Office of Management and Budget (OMB) suggests federal agencies may want consider providing public interest waivers of BABA requirements for components that comprise small purchase amounts and for awards or expenditures that fall below the Simplified Acquisition Threshold. HAC agrees that such waivers would be in the public interest, and notes that they would be particularly appropriate in rural contexts.

HUD's implementation of the buy American preference in the 2009 [American Recovery and Reinvestment Act](#) (ARRA) should be instructive here. That preference applied to any use of funds appropriated by ARRA, so there was no need to determine what housing to define as infrastructure, but in some ways ARRA's provisions were strikingly similar to BABA's. Both statutes permit waivers in the same three sets of circumstances, for example.

HUD's [Office of Public and Indian Housing](#) (PIH) issued several exceptions to ARRA's buy American preference. Particularly relevant here was PIH's decision to exempt ARRA-funded projects from the preference if either a grant from PIH to a public housing authority (PHA) or a contract issued by a PHA using ARRA funds was beneath the Simplified Acquisition Threshold – the dollar amount below which formal federal procurement methods are not required ([2 CFR §200.320](#), [48 CFR §2.101](#)).

[PIH explained](#) it was taking into account “the use of literally thousands of miscellaneous, generally low-cost components” such as nails and hinges in every construction or modernization project and the difficulty of identifying the country of manufacture and the availability of alternatives for these components. These factors



would be particularly challenging for the more than 2,300 small PHAs with fewer than 250 units in inventory, many of them located in rural areas or small towns.

HUD understands that these PHAs in particular often have to search further in order to procure American-made items and find contractors familiar with the Buy American requirement. For these PHAs, it takes additional time to procure, and there are increased costs associated with bringing materials and contractors in from a great distance. Under the requirements of the Recovery Act, HUD is concerned that it could be disproportionate to the costs and time involved for the PHA or their contractor and would not be feasible for PHAs to find alternatives. . . .

Recognition of the lack of availability and access to resources as well as relief from administrative burdens are critical to the success of small PHAs and consistent with Recovery Act objectives. As with any new requirement, implementation of the Buy American requirement will take analysis and resources that are not readily available to small PHAs. The need for the expeditious and efficient use of the [ARRA] funds balanced with the long established recognition of decreased availability of resources available to small PHAs clearly supports [the exceptions based on the Simplified Acquisition Threshold].

HUD's [Office of Community Planning and Development](#) adopted two parallel exceptions based on the Simplified Acquisition Threshold, as well as an exception for contracts involving properties with fewer than eight units.

The logic applied in 2009 is only more compelling in the current economic climate. Unlike the Great Recession, triggered by a collapse of the housing market and depletion of the housing construction sector of the labor market and few supply chain challenges, today, every corner of the U.S. is experiencing shortages of materials and sharply escalating prices. Small and rural PHAs and nonprofits still have severely limited staff and resources and still find it challenging to access varied sources of construction materials at a reasonable cost.

The Simplified Acquisition Threshold in 2009 was \$100,000. In 2022 it is [\\$250,000](#). HUD should, therefore, provide waivers or exemptions from BABA's preference for any housing involving HUD financial assistance of less than \$250,000 or a contract under \$250,000 as well as any assistance to relating to developments with fewer than eight units.

HUD should exempt or waive BABA preferences when HUD funding covers only a small portion of the per unit development cost.

If HUD determines that an affordable housing project that includes some HUD-funded public facing infrastructure improvements must comply with BAP, HAC strongly recommends a general waiver in cases where the infrastructure budget is



less than 25 percent of the entire project's budget. Additionally, if the infrastructure portion of a project is more than 25 percent of the budget, we strongly recommend that only the infrastructure portion of the project be required to comply with the documentation and administrative requirements.

SHOP provides a maximum of \$15,000 per unit. This is only 6 percent of the total average cost for SHOP-assisted homes developed by HAC's affiliates. If BAP must be applied to the entire project, including the vertical construction of the housing units, it is likely that the cost increase will be more than 6 percent and, as a result, the SHOP funds will lose all of their value.

11. What situations would require expedited or general waivers? How can HUD develop its waiver criteria in a way that identifies these expedited or general waivers? Are there situations where the cost of the materials would always meet the standards for waivers established under Section 70914 of the Act, whether a cost, public interest, or nonavailability waiver?

HUD should issue a blanket waiver to prioritize addressing the affordable housing crisis.

In 2022, providers and clients of affordable housing are facing crises in the availability and costs of housing, building materials, and labor. While buying American is an important goal, addressing the housing crisis must be HUD's top priority. That will require stretching all available funds and human resources as far as possible by obtaining the lowest-priced quality goods available and using staff time for the most pressing tasks first.

HUD should issue expedited waivers for materials that experience price spikes.

In addition to adopting the general waivers described above, HUD should provide expedited waivers for materials that experience sharp increases in price or large drops in availability, as was recently the case with [lumber](#). The Covid-19 pandemic exposed the vulnerabilities of supply chains. Supply issues were expected to stabilize moving into 2021 as production resumed and supplies normalized. Pandemic-induced supply shortages persist, however, affecting key materials such as lumber, paint and coatings, aluminum, steel, and cement, among others. Further limiting the supply by requiring affordable home developers using federal funds to limit the sources of their materials will further exacerbate an already problematic situation.

The impact of this crisis is twofold. The first challenge is the lack of materials; per an Associated General Contractors of America survey, 75 percent of engineering and construction firms indicated project delays due to longer lead times or shortage of materials. Further, 57 percent reported delivery delays, indicating that the industry has difficulty predicting when materials would arrive. The second impact is sharply increased costs. For example, the producer price index (PPI) for lumber is 51 percent



above the pre-pandemic levels, windows are up 46 percent, and cabinets have risen by 21 percent. Without foreign competition, the cost of American-produced materials will rise further.

According to the National Association of Home Builders, recent volatile lumber prices have caused the average price of a new single-family home to increase by more than \$18,600 in the year ending June 2022.

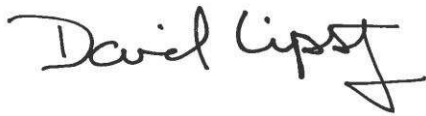
Wages have not kept up, so the cost increases cannot be passed on to homebuyers or tenants without decreasing affordability.

HUD should provide guidance to help reduce administrative burdens.

To help recipients of its funding use their resources as efficiently as possible and reduce administrative burdens on small entities, HUD should conduct ongoing research and provide up-to-date information about sources of construction materials that meet BABA requirements or conditions of HUD waivers.

Thank you for your consideration of these comments. Please do not hesitate to contact me if you need additional information.

Sincerely,



David Lipsetz
President & CEO

