

Procurement - How Build American, Buy American (BABA) Applies to Public Housing Agencies

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Moderator: Thomas Lewis, Esq., General Counsel, California Affordable Housing Agency, Merced, CA
Howard Baum, Esq. Deputy General Counsel, Housing Authority of the City of Los Angeles, L.A., CA
Jim Kruse, Executive Director, Stanislaus Regional Housing Authority, Modesto, CA
Michael Tarantino, Esq. Deputy General Counsel, Seattle Housing Authority, Seattle, WA

Background

On November 15, 2021, President Biden signed into law the Infrastructure Investment and Jobs Act, which includes the Build America, Buy America Act, a.k.a. “BABA”.

BABA established a domestic content procurement preference (a.k.a. “Buy American Preference” or “BAP”) for all Federal financial assistance obligated for “infrastructure projects” after May 14, 2022. The BAP requires that all iron, steel, manufactured products, and construction materials used in covered infrastructure projects be produced in the United States.

“Produced or Manufactured Products” must be at least 55% U.S. components sourced.

BAP may apply to several programs administered by HUD including the Public Housing Capital Fund, CDBG, HOME, and the Project Rental Assistance Demonstration.

Reference: Pub. L. No. 117-58, §§ 70901-52; 2 CFR 200.322

HUD Temporary Waiver and RFI

On May 14th, HUD waived all BABA requirements until November 14, 2022*.

On June 1, 2022, HUD published a Request for Information (RFI) in the Federal Register (FR-6331-N-03) seeking responses to twelve questions concerning the possible impacts of BABA compliance on PHAs and contractors.

Approximately 60 PHAs and trade organizations including NAHRO, CLPHA and PHADA responded to the RFI by the submission deadline of July 15th.

See: <https://www.regulations.gov/docket/HUD-2022-0033/comments>

**Note: HUD may shorten the waiver period by providing final notice confirming completion of public comment period or extend the waiver period through issuance of a notice.*

BABA Waiver Process

Once BAPA is implemented PHAs will be able to apply for limited project-specific waivers that may take considerable time to secure. All waiver requests must go through the OMB's new Made in America office.

HUD has authority to waive the application of the BAP 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.

Note: Section 70914(c) provides that a waiver under 70914(b) must be published by HUD with a detailed written explanation for the proposed determination and provide a public comment period of not less than 15 days.

More information on the waivers is available at: https://www.hud.gov/program_offices/general_counsel/BABA

ANALYSIS OF BABA AND ITS BAP

BABA's goals of supporting American manufacturers and products, and strengthening domestic supply chains is commendable but raises many concerns and questions that fall into the following areas.

- New Burdensome, Unknown and Unfunded Administrative Processes
- Inflationary Effects on Maintenance, Construction and Redevelopment/Repositioning Activities
- Maintenance, Construction and Development Project Completion Delays
- Impacts Upon Existing and New Contracting Activities
- Impacts Upon Small and Disadvantaged Businesses
- An Unclear and Unsupported HUD Waiver Process That Lacks Established Exemptions or Waivers
- Short Implementation Time Frame
- **Whether PHAs should be exempt from BABA by definition or HUD waiver**

Administrative Processes and Burdens

Very few details are known on BABA reporting and regulatory requirements. Questions include:

- How does a PHA determine its purchases comply with BABA?
- Can PHAs rely upon contractors/vendors self-certification?
- What does “certification” look like? (no standard forms to date)
- What level of investigation is required to determine if a manufactured product is eligible (55% domestically procured materials) see: 2 CFR 200.322.
 - PHAs lack the staffing and expertise to determine.
- What level of investigation and documentation is required to seek a waiver?
- What compliance records will PHAs be required to create or secure and maintain?

Note: Compliance will be a significant and unfunded administrative burden on PHAs.

Inflationary Effects

The COVID 19 pandemic and its ongoing effects have led to historic supply chain issues, disruptions and inflation. For example:

- The State of California Building Material Costs Index rose 31.3% from early 2020 to early 2022, with the index climbing 10.6% in the 5 months prior to 4/2022 alone.
- Significant Materials Backlogs (e.g. concrete, electrical and plumbing supplies, windows, countertops, cabinetry, water heaters, appliances, etc.)
- “BABA compliant” materials are expected to cost 15-30% more (when available)

According to the National Public Housing Capital Needs Assessment, the Capital Fund backlog was estimated to be at least \$70 billion as of 2019. BABA will further hamper material sourcing, cause an inflationary effect and this figure to balloon, thereby putting efforts to address the backlog further out of reach.

Efforts to address the backlog through repositioning PHA assets may be equally frustrated.

Project Completion Delays

Sourcing Materials: Domestic capacity, production and availability of “BABA Compliant” products in sufficient quantities and quality will be problematic; Longer lead times may be required available.

Certifications/Waiver Request: Projects could be significantly delayed, and start and stop frequently if PHAs must investigate product availability and/or wait for product certifications, seek and obtain waiver approvals.

Procuring Contractors: Securing any or an adequate number of bidders may cause delay or require rebid. Contractor reluctance to participate in bidding due to additional administrative burdens associated with compliance responsibilities should be expected.

Cost of Project Delays and Consequences

PHA Maintenance, Repair and Construction Activities

- Delays in unit rehabilitation/repair and rental
 - Issue: Repair of appliances, water heaters and other products with foreign components
 - Effect upon REAC and PHAS scores where maintenance and repairs cannot be timely made?
- Inability to complete time-sensitive emergency repairs, reasonable accommodations, respond to natural disasters
- Increased cost of Project Payment and Performance Bonds for Construction Projects

Redevelopment/Repositioning Projects

- Impact on Project Financing including deadlines for expenditures and added carrying costs
- Delayed project completion and rental

Effect upon Existing and New Contracts

■ **Supplies and Materials Contracts**

- Will “American made” sourcing information and certifications be required?
- Will all needed products be available and in sufficient quantities?
- Will contracts need to be amended or terminated?

■ **Pre-existing Maintenance and Construction Contracts**

- Will they be grandfathered in?

■ **Procurement**

- Will amendment of pre-existing contracts violate Part 200?
- What requirements should be imposed upon new contracts during this waiver period?

Impacts upon Small and Disadvantaged Businesses

- **Contractors:** Small and Disadvantaged Businesses (MBE/WBE, LSA, Small and Section 3 Businesses) already struggle to meet Davis-Bacon, Section 3 and other contracting requirements (e.g. insurance, bonding, etc.). The additional burden of complying with BAP including sourcing US made materials and certifying to their use will serve as a further contracting impediment and discourage participation.
- **Suppliers:** Small suppliers ability to comply with certification process and identify US sourced materials.

Recommended HUD Findings

Public Housing is not an “infrastructure project” within the meaning of BABA

For purposes of determining an “infrastructure project” within the meaning of BABA, OMB writes that “Agencies should consider whether the project will serve a public function, including whether the project is publicly owned and operated, ...or is a place of public accommodation [...]. Projects consisting solely of the purchase, construction, or improvement of a private home for personal use, for example, would not constitute an infrastructure project.”

Public Housing units are not open to the public and are unlike other infrastructure projects such as highways, roads, bridges, and other spaces that are fully public in their use and nature. Public Housing units are rented to private tenants with use and possession limited and only authorized pursuant to rental agreements.

Even more removed, LIHTC/Mixed-Financed Projects should be excluded as being privately-owned and not open to the public

Request HUD Waiver of Public Housing from BABA

Even if Public Housing (PH) is found to meet the definition of an “infrastructure project”, ask HUD to use its discretion to waive the application to PH.

- Under OMB Memorandum M-22-111(April 2022), HUD has broad discretion to mitigate BABA impacts by instituting public interest and cost threshold waivers. Per OMB M-22-11, “a waiver in the public interest may be appropriate where [HUD] determines that other important policy goals cannot be achieved consistent with the Buy American requirements established by the Act and the proposed waiver would not meet the requirements for a non-availability or unreasonable cost waiver.”
- The provision of affordable housing to the elderly, disabled, and impoverished families and children is of great public concern. HUD should heavily weigh the importance of these programs against the benefits of the strict BABA requirements.

Blanket HUD Waivers Where Above Not Granted

- **Natural Disasters, Emergency Repairs and Reasonable Accommodations**

HUD must include a blanket waiver for services and supplies needed to respond to all the above as each requires an immediate response to protect people and property, or is required by law.

- **Maintenance and Repair Activities**

It is critical that maintenance and repair activities be performed in a timely manner to protect people and property and ensure public housing is decent, safe, sanitary and in good repair, as required under 24 CFR 5.703. Moreover, supplies and manufactured products such as appliances, certain fixtures, and water heaters used in support of these activities frequently include foreign components or are only available from foreign sources.

- **Existing Contracts for Goods and Services**

Pre-existing contracts for goods and services should be grandfathered/excluded from BABA to maintain business continuity, avoid the administrative burden of terminating and resoliciting all non-BABA compliant contracts, avoid possible violations of Part 200 procurement regulations associated with amendments, avoid disruption to contractors and vendors, and avoid possible payments due them for “terminating for convenience.”

HUD-Initiated Categorical and Other Possible Waivers

■ **HUD-Initiated Categorical Waivers**

Certain BABA compliant materials and supplies are not readily available. PHAs should not be required to repeatedly re-submit waiver requests for such items. HUD should recognize these products and create a categorical waiver for them.

There is a precedent for such an approach: The National Telecommunications Information Administration and other agencies previously granted similar waivers for information technology products (less than 55% US made) that was included in the 2009 American Recovery and Reinvestment Act (“ARRA”).

■ **Other Possible Waivers**

A de minimus threshold or public interest waiver in an amount aligned with the existing federal procurement regulation (2 CFR 200) Small Purchase Threshold of \$250,000, or a greater amount.

REAC and PHAS Scores: HUD should be prepared to make adjustments to scoring where reasonable efforts to maintain and preserve public housing are documented.

HUD Administration/Waiver Process

■ **Certifications**

HUD should create a Buy American certification process and associated guidelines for PHAs, contractors, and suppliers.

■ **Waiver Process**

In those instances where a blanket waiver or exemption is not applicable it is essential that HUD and the Made in America Office establish a simple waiver process which must include a timely response to any waiver requests. HUD must also be prepared for waivers related to obligation deadlines.

■ **Administrative Support**

HUD should ensure it has sufficient resources to properly staff for BABA implementation in recognition that over 3,200 PHAs will require routine and frequent assistance.

Next Steps/Advocacy

- Implementation of BABA must be further stayed until all the above are considered.
- If PHAs are not exempted from BABA, implementation cannot responsibly commence until such time as HUD administrative, regulatory and financial support for BABA and any waivers not granted are provided.
- What You Can Do Now:
 - ✓ Support Trade Organizations such as NAHRO, PHADA and CLPHA in their efforts to advocate for PHA and LIHTC/Mixed-Finance Projects waivers from BABA
 - ✓ Reach-out to Legislators and other Elected Officials and share your concerns
 - ✓ Communicate concerns with your HUD Field Office