



Council of Large Public Housing Authorities

455 Massachusetts Avenue, NW, Suite 425

Washington, DC 20001-2621

Executive Director: Sunia Zaterman

phone: 202.638.1300 | **fax:** 202.638.2364

web: www.clpha.org

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

RE: [Docket No. FR-6331-N-03] Request for Information Relating to the Implementation of the Build America, Buy America Act

To whom it may concern,

The Council of Large Public Housing Authorities (“CLPHA”) appreciates the opportunity to submit comments to the United States Department of Housing and Urban Development (“HUD”) in response to the notice titled “Request for Information Relating to the Implementation of the Build America, Buy America Act.”

CLPHA is a non-profit organization that works to preserve and improve public and affordable housing through advocacy, research, policy analysis, and public education. Our membership of more than seventy large public housing authorities (“PHAs”) own and manage nearly half of the units in the nation’s public housing program, administer more than a quarter of the subsidies in the Housing Choice Voucher Program, and operate a wide array of other housing programs.

The ongoing impact of the COVID-19 pandemic continues to represent a serious threat to the short- and long-term well-being of many vulnerable families in HUD-assisted housing and to the PHAs that own and manage housing and vouchers for nearly 3.3 million households. CLPHA supports the nation's largest and most innovative PHAs by advocating for the resources they need to solve local housing challenges.

CLPHA is concerned that the requirements of BABA will impede PHAs’ ability to serve vulnerable residents. Public housing developments provide affordable homes to 1.8 million low-income Americans. In 2020, 56 percent of public housing households were headed by older adults or people with disabilities. More than one-third of all residents are children under the age of 18. However, BABA ultimately undermines PHAs’ ability to provide safe, decent, affordable quality housing to serve these most vulnerable populations by increasing construction costs and delaying timelines to construct affordable housing units, disrupting day-to-day PHA operations like property maintenance, and impeding PHAs’ ability to provide reasonable accommodations and accessible units.

Certain requirements of BABA could also impose undue burdens on PHAs. At a time when inflation is making construction materials costlier and the Operating Cost Adjustment Factors (OCAF) used for adjusting or establishing Section 8 rents for projects assisted with Section 8 Housing Assistance Payments haven't yet taken inflation into account, the Buy American requirements – if implemented hastily – could put added pressure on the already strained resources of PHAs. HUD must be mindful that extra regulations can hinder the ability of PHAs to fulfill their mission to deliver affordable housing by increasing both project costs and completion time.

BABA Should Not Apply to Public Housing

CLPHA is supportive of efforts to strengthen domestic supply chains. However, for the purposes of defining the applicability of the Buy America Domestic Content Procurement Preference (“Buy America Preference,” or “BAP”), the Infrastructure Investment & Jobs Act (IIJA) defines a project to include “the construction, alteration, maintenance, or repair of infrastructure in the United States.” According to the April 18, 2022, Memorandum from the Executive Office on the implementation of BABA, the term ‘infrastructure’ includes, at a minimum, ... buildings and real property. [...] Agencies should interpret the term ‘infrastructure’ broadly and consider the definition provided above illustrative and not exhaustive. [...] Agencies should 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 [...] Projects consisting solely of the purchase, construction, or improvement of a private home for personal use, for example, would not constitute an infrastructure project.”

Although most public housing capital-funded projects are publicly owned and operated, **CLPHA strongly urges that HUD find that public housing capital-funded projects are not infrastructure projects.** These projects are not open to the public and are reserved for private residential use by the tenants. The indicia of ownership and operation make a typical housing project more akin to a private home for personal use, which the Office of Management and Budget (OMB) has stated would not qualify as an infrastructure project.

Regardless of whether public housing capital-funded projects generally qualify as infrastructure projects, we urge that HUD find, at a minimum, that LIHTC/Mixed-Finance projects do not. These projects are privately owned by an entity other than the PHA and the units within these buildings are not open to the public. As with public housing projects generally, the projects are reserved for private residential use by the tenants, and access to these projects is usually strictly regulated. Accordingly, LIHTC/Mixed-Finance projects, being both privately owned and not open to the public, should not be considered infrastructure projects.

Nonetheless, if HUD determines that the BAP applies to public housing capital-funded projects, CLPHA makes the following recommendations to ensure the final regulations balance Buy American requirements with flexibilities allowing for PHAs to construct and administer housing programs efficiently.

1. Delay the implementation of Buy American Requirements.

Implementation of BABA will be a large programmatic and administrative burden for PHAs, both internally with document and process adjustment, and externally with contractor outreach and education. Accordingly, CLPHA members believe an adjustment period of at least *one year* beyond the expiration of the General Applicability Waiver of BABA is necessary prior to enforcing Buy American requirements.

Critically, little information is available on the impact and costs of BABA requirements. CLPHA recommends HUD begin a concerted outreach effort to educate and inform PHAs on the requirements of BABA. These efforts could include creating one-page BABA overview documents, webinars, Frequently Asked Questions, and improving HUD's [BABA webpage](#).

2. Grant a waiver that grandfathers into compliance projects that were ongoing and predated the implementation of BABA.

CLPHA members are concerned that current supply chain issues could exacerbate the delays in sourcing American-made materials and ultimately delay project completion. Projects could start and stop frequently if PHAs must wait for this additional layer of certification or waiver approval to be completed. These delays could also impact the financing of projects as certain financing structures have deadlines for expending funds.

3. Provide a safe harbor for PHAs that reasonably make efforts to ensure the materials used in housing are made in America.

Due to the uncertainty on what percentage of certain materials must be made in/sourced in America and the limited administrative capacity of PHAs to investigate each material, HUD should adopt a safe harbor for compliance with the Act. PHAs that complete a minimum level of due diligence to ensure the materials they source are made in America should not face penalties.

4. Define and give common examples of American-made “manufactured products” and “construction materials” for PHAs to easily reference in a database.

HUD should provide a database of regularly used products, their availability, and whether they meet the act's definition of American-made. HUD should create a standard waiver category for manufactured items and construction materials obtained via single-source procurement. This waiver category would certify that such items comply with safe harbor provisions. Additionally, HUD should also include the types of activities that have (or have not) been determined to be in the public interest. Such a database would greatly ease the burden of due diligence on PHAs.

5. Create a Buy American certification process and associated guidelines for PHAs, contractors, and suppliers.

PHAs generally have not been subjected to Buy American requirements previously. As a result, they do not have standard procedures for determining the sourcing of materials from

contractors and suppliers. Requiring PHAs to develop their own American-made certification processes and associated guidelines for a domestic content procurement preference is onerous and may lead to inconsistent application of the intent of the Act. Moreover, this is an unfunded mandate. If compliance is mandated, HUD should provide funding and support for implementation and compliance.

6. Clearly define the requirements by which a waiver will be granted in a guidance document.

HUD should clearly define the requirements by which a waiver will be permitted in a guidance document. The waiver process and required documentation should be explicitly laid out on HUD's BABA webpage. Guidance should include exceptions from the typical waiver process for disaster situations and emergency repairs; categorical blanket waivers for products back-ordered due to supply chain shortages (like electronics) and items lacking a domestic supply chain; definitions of phrases like "made in America," "manufactured products," "construction materials," and what is in the public interest; and the thresholds of cost and time increases which must be met for waivers to be granted.

See below our organization's comments to selected questions posed in HUD's Docket No. FR-6331-N-03, Request for Information Relating to the Implementation of the Build America, Buy America Act:

Question 2: What aspects of housing are defined as public functions?

The statute specifies that a Buy American waiver can be issued if the types of manufactured products or construction materials aren't produced in the U.S. in a sufficient quantity. HUD should define and give common examples of "manufactured products" and "construction materials" for PHAs to easily reference. General uncertainty around the definition of an American-made "manufactured product" and "construction material" is reason enough to delay the implementation of the Buy American provisions.

Other policies that are in the public interest, such as sustainability goals, may be impacted by BABA's Buy American requirements. A BABA waiver category could be considered for cases where the Act's Buy American requirements would run contrary to the public interest served by other policy goals.

Further, small suppliers that would employ low-income persons when federal dollars are expended in construction and non-construction or service contracts to meet Section 3 employment and contracting goals may be unable to compete with larger firms for contracts. Sourcing materials from small businesses to support Section 3 compliance can potentially be another waiver category given that it is in the public interest to support these enterprises. We would encourage HUD to assess other areas where compliance with BABA might conflict with existing HUD requirements, especially those that support the public interest and/or HUD and the Administration's equity goals.

Question 5: How do PHAs currently determine sourcing for materials and contractor sourcing? Are there existing mechanisms to locate American-made iron, steel, manufactured products, or construction materials?

PHAs generally have not been subjected to Buy American requirements previously. They do not have standard procedures for determining the sourcing of materials from contractors. Many smaller

PHAs also lack the purchasing power to require vendors to provide details on the sourcing of materials and supplies. Certain large suppliers have ‘custom catalogs’ that allow buyers to sort by American-made products, but smaller suppliers do not always have such catalogs as an option. This could exclude smaller suppliers without sortable catalog technologies from competing for PHAs’ business.

HUD should create a Buy American certification process and associated guidelines for PHAs, contractors, and suppliers to follow, as it would be onerous to require PHAs to develop their own American-made certification processes. HUD should not require PHAs to report the extent to which construction materials were sourced in the U.S. and those that were not. This information can be obtained by HUD from numerous other entities such as trade associations, private entities, non-profit think tanks, and other federal agencies like the SBA.

Question 6: Are PHAs currently subjected to Buy American requirements from other Federal, state, local, or Tribal entities?

While we assume that HUD would inform PHAs of any existing Buy American requirements, to the best of our knowledge CLPHA members are not currently subject to any such requirements for other federal, state, or tribal regulations. The only remotely comparable sourcing requirements that PHAs may face are those to achieve LEED certification on a building. In these cases, the building must be constructed to certain eco-friendly specifications using specific materials. However, CLPHA members report that when undertaking such projects, they incur additional administrative costs and time-to-completion by hiring third-party consultants to source the necessary materials and ensure compliance.

Moreover, PHAs have experienced staffing shortages due to the COVID-19 pandemic. Many PHAs lack the staff capacity, time, and resources to investigate whether a product meets the vague description of a domestically procured material as defined in 2 CFR 200.322. HUD should disseminate information, provide technical assistance on best practices, and request additional administrative funding for PHAs to meet requirements for sourcing American-made materials.

Question 7: Are there any plans in the iron, steel, manufactured products, or construction materials industries to provide documentation regarding materials' compliance with BABA?

CLPHA members voiced concerns about ensuring everything they purchase will comply with the Act’s definition of “made in America”. Most importantly, HUD should provide a safe harbor for PHAs that reasonably make efforts to ensure the materials used in housing are made in America.

Specifically, there is uncertainty about the definition of what “produced” means. What percentage of each manufactured product and construction material must be made in/sourced from America for it to comply with the Buy American requirement? The legislation specifies that “produced in the United States” is defined as “the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55% of the total cost of all components of the manufactured product.” PHAs do not have the expertise or staff capacity to determine whether every manufactured product purchased is at least 55% sourced from America. To make matters more confusing, Section 70921 subpart C of the authorizing legislation also states that it is the sense of Congress that the regulation should “increase the domestic content requirements for domestic end products and domestic construction material to 75%, or, in the event

of no qualifying offers, 60%.” HUD should clarify the definition of what “produced in the U.S.” means and what the percentage is to avoid confusion among PHAs.

HUD should also provide a database on all regularly used products, their availability, and the types of activities that have (or have not) been determined to be in the public interest. While some larger suppliers have online product catalogs that allow PHAs to filter by American-made products, other smaller suppliers may not have this capability. This presents the risk of allowing supplier monopolies to develop as well as potentially increasing the cost of those materials. To mitigate this potential issue, HUD should create a list of commonly used American-made materials on its BABA webpage.

Question 8: What are the contractor's administrative costs associated with complying with BABA?

Small and Disadvantaged Businesses may not be able to easily comply with Buy American requirements thereby precluding their participation in contracting with PHAs. Larger contractors that handle multi-million-dollar infrastructure projects are more familiar with Buy American requirements and will be more easily able to comply with them. CLPHA members estimate that the Buy American provisions could cause project costs to rise by 15-20% on average. Such cost increases could make a project no longer feasible, which would be a direct contradiction to the Biden Administration’s Housing Supply Action Plan.

HUD should also clarify whether the Buy American provisions will apply to subcontractors, as well as whether PHAs will need to manage reporting of clients for contractors and subcontractors.

Question 9: What are the specific concerns about a potential waiver process?

HUD should clearly define the requirements by which a waiver will be permitted in a guidance document. The waiver process and required documentation should be explicitly laid out on HUD’s BABA webpage.

PHAs should not be required to repeatedly re-submit required documentation for waiver requests that are nearly identical in scope and nature. To improve the efficiency of waiver requests, HUD should draft pre-approved blanket waivers that PHAs can request.

HUD has indicated that all waiver requests must go through the OMB’s new Made in America office, and general applicability waivers must go through a comment period of at least 30 days. Because statute requires that all waivers be reviewed and issued through this centralized OMB office, CLPHA members have expressed concerns that requirements to submit a waiver for routine maintenance or repairs to units will cause delays to meet basic housing quality standards.

Another major concern among CLPHA members is that a Buy American requirement for certain special materials that presently lack a domestic supply chain may add significant cost and time to each project. These include materials such as electronic components, certain appliances, cars, bathroom fixtures, lighting fixtures, and surveillance and access control systems. HUD should consider adding categorical waivers for these products so that PHAs don’t have to repeatedly file waivers and submit identical documentation for one type of specialty item that has previously been granted a waiver.

Question 10: How will BABA requirements affect relocation plans, transfer procedures, and/or reasonable accommodation or modifications procedures for existing occupants?

It is *critical* that waiver requests receive a timely response. Lengthy turnaround times for waiver requests can significantly increase the time it takes for PHAs to construct new units, renovate existing ones, and complete maintenance or repairs. This comes at a time when supply chain issues are already making it difficult to source certain materials, which adds time to project completion. PHAs are concerned that supply chain issues could exacerbate the delays in sourcing American-made materials and ultimately delay project completion. Projects could start and stop frequently if PHAs must wait for this additional layer of certification or waiver approval to be completed. These delays will impact the financing of transactions that have deadlines for expending funds. CLPHA recommends a waiver category for instances when the sourcing of American-made materials would delay the maintenance, rehabilitation, or redevelopment beyond a certain amount of time, particularly for circumstances involving the health and safety of residents.

Long response times on waivers can create major backlogs for PHAs, ultimately undermining their ability to provide existing residents with reasonable accommodations as well as prepare accessible units for residents. The 2019 Affordable Housing Survey found that almost 2 in 10 U.S. households have accessibility needs, and 4 in 10 homes currently do not have accessibility features such as entry-level bedrooms or full bathrooms. If a new resident needs a mobility aid such as a wheelchair ramp installed, procuring it from an American-made source could delay that tenant from moving in and may subject PHAs to penalties for noncompliance with reasonable accommodation requests.

HUD should create a standard waiver category for single-source procurement. If a manufactured item were deemed “American-made” by its supplier, that item would meet the Buy American safe harbor provisions. As an example, if a grab bar – a safety device commonly requested as a reasonable accommodation by senior and disabled public housing residents to prevent slips or falls – is deemed American-made by the supplier that sells it, then the item would comply with the Buy American safe harbor provisions.

CLPHA members also inquired about whether the Buy America, Build America requirements will affect ongoing projects that predated the Act, and projects for which deals have already closed but construction hasn’t yet begun. CLPHA recommends that these projects be grandfathered into compliance so as not to delay construction on new properties, especially given the current nationwide demand for increasing housing supply.

The Act’s Buy American requirements could also delay Rental Assistance Demonstration (RAD) transactions for projects currently under construction and projects in the pipeline. Delays can also jeopardize other financing sources such as tax credits and others that have closing deadlines. Absent additional funding to cover the increased cost of American-made materials, the feasibility of transactions could be threatened. For these reasons and many more, CLPHA members ask that the implementation of the Buy American requirements be delayed at least *one year* beyond the expiration of the General Applicability Waiver of BABA to allow PHAs additional time to prepare.

Question 11: What situations would require expedited or general waivers?

Many products are assembled in America using parts from outside the country. HUD should ensure that these situations comply with the final regulations under the Act’s Buy American requirement.

Products such as cars, bathroom fixtures, lighting fixtures, and surveillance and access control systems will regularly be requested by PHAs for exemption from the Buy American requirements. Waivers for these and other categories of construction materials are necessary so that PHAs do not repeatedly have to file documentation and request waivers for the same categories of items.

Tenants' lives are disrupted when they must be temporarily relocated for emergency fixes to their dwellings, so PHAs must move expeditiously to complete these repairs. HUD should create an expedited waiver category for items necessary for emergency maintenance and repairs as well as health and safety-related work.

HUD must also include an exception from waivers for disasters. The statute explicitly states that the 15-day public comment period for a Buy American provision waiver does not apply when "satisfy[ing] an urgent contracting need in an unforeseen and exigent circumstance." To this extent, HUD should clarify what these "unforeseen and exigent circumstances" are and provide examples of them on its BABA webpage. Examples of these could include natural disasters like hurricanes and tornadoes, fires, floods, and other Presidentially Declared Disasters. This waiver category should also be extended to the 17 types of waivers outlined in FR-6301-N-01 (Regulatory and Administrative Requirement Waivers and Flexibilities Available to HUD Public Housing and Section 8 During CY 2022 and CY 2023 to Public Housing Agencies to Assist with Recovery and Relief Efforts on Behalf of Families Affected by Presidentially Declared Disasters).

Thank you for the opportunity to comment on these most important regulations and their impact on the residents we serve.

Sincerely,

A handwritten signature in cursive script that reads "Sunia Zatterman". The signature is written in black ink and has a fluid, connected style.

Sunia Zatterman
Executive Director
Council of Large Public Housing Authorities